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Supreme Court of the United States

OCTOBER TERM, 1964

No. 19

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THE AMERICAN OIL COMPANY, APPELLANT,

vs.

P. G. NEILL, ET AL.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

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FILED DECEMBER 24, 1963  
JURISDICTION NOTED JUNE 8, 1964

# SUPREME COURT OF THE UNITED STATES

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## INDEX

	Original	Print
Record from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County		
Complaint	9	1
Motion to dismiss	17	6
Order amending complaint	20	7
Supplemental complaint (excerpts)	27	7
Second supplemental complaint (excerpts)	39	10
Third supplemental complaint (excerpts)	49	12
Fourth supplemental complaint (excerpts)	60	14
Fifth supplemental complaint (excerpts)	69	17
Letter from the Comptroller General of the United States to the Chairman of the Atomic Energy Commission, dated November 5, 1951	74	19
Decisions of the Comptroller General	78	22
Schedules II of Motor Fuel Tax Reports for the months of November 1959 through October 1960, inclusive, attached to various applications for refund filed with the Tax Collector of the State of Idaho	118	27



Record from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County—Continued

Request for admissions under Rule 36	187	44
Defendant's admissions, denials and objections to plaintiff's request for admission	195	50
Affidavit of K. W. Grundmeyer	216	56
Affidavit of W. L. Olsen	221	60
Affidavit of Harold R. Belles	227	65
Attachment—General Services Administration Contract No. GS-10S-14022	231	68
Motion of plaintiff for summary judgment	373	200
Affidavit of P. G. Neill	381	201
Affidavit of Robert E. Bakes	386	205
Motion to dismiss plaintiff's motion for summary judgment	389	207
Affidavit of W. A. Erickson	392	207
Supplemental affidavit of P. G. Neill	399	209
Stipulation re plaintiff's request for admission and defendant's objections thereto	409	212
Order substituting party plaintiff	411	213
Supplemental affidavit of Robert E. Bakes	412	214
Alternative motion of defendant	416	217
Memorandum decision, Young, J.	420	218
Supplemental motion to dismiss	434	226
Stipulation for substitution of party-defendant	446	227
Order substituting party-defendant	447	228
Motion for order modifying order substituting party-defendant and notice	450	228
Order, October 9, 1961	515	230
Summary judgment	519	231
Affidavit of Robert E. Bakes	522	234
Modified order	531	235
Order, October 20, 1961	535	237
Amended summary judgment	536	238
Decision and order, Young, J.	549	240
Defendant's notice of appeal to the Supreme Court of the State of Idaho	568	241
Plaintiff's notice of appeal to the Supreme Court of the State of Idaho	570	243

**INDEX**

iii

	Original	Print
Proceedings in the Supreme Court of the State of Idaho _____	669	245
Docket entries _____	669	245
Order substituting party-defendant _____	671	248
Opinion, McFadden, J. _____	677	249
Order directing withholding dismissal of action _____	698	269
Notice of appeal to the Supreme Court of the United States _____	699	270
Clerk's certificate (omitted in printing) _____	711	272
Order noting probable jurisdiction _____	712	272

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR  
ADA COUNTY**

Civil No. 30025

**THE AMERICAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent and Cross-Appellant,**

**vs.**

**P. G. NEILL, Former Tax Collector of the State of Idaho, and  
VERNON E. DROWN, Acting Tax Collector of the State  
of Idaho, Defendants-Appellants and Cross-Respon-  
dents.**

[fol. 9]

**COMPLAINT—Filed March 14, 1960**

Comes Now, The Plaintiff, Utah Oil Refining Company, a corporation, and complains of the Defendant, P. G. Neill, Tax Collector of the State of Idaho, and for a claim for relief alleges as follows:

**I.**

That at all times material to this action the Plaintiff, Utah Oil Refining Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to do business in the State of Idaho, having complied with all of the laws of the State of Idaho pertaining to foreign corporations.

**II.**

That at all times material to this action the Defendant, P. G. Neill, was and now is the duly appointed, qualified and acting Tax Collector of the State of Idaho, and a resident and citizen of Boise City, County of Ada, State of Idaho.

## III.

That at all times material to this action, the Atomic Energy Commission was and is an agency of the Government of the United States of America, and has been operating within the State of Idaho plants and facilities serving the governmental purposes of the United States. That in furtherance of its governmental purposes the Atomic Energy Commission has required quantities of gasoline for use as motor fuel in connection with the operation of its plants and facilities. That in response to an invitation for bids issued by the General Services Administration, an agency of the United States Government, from its [fol. 10] offices at Seattle, Washington, Plaintiff became the successful bidder and entered into a written contract, identified as General Services Administration Contract No. GS-10S-14022, for supplying f.o.b. Refinery, Salt Lake City, Utah, certain quantities of gasoline for requirements of the Atomic Energy Commission in connection with its operations referred to above. Plaintiff's bid emanated from its principal offices at Salt Lake City, Utah, and was accepted at Seattle, Washington.

## IV.

Pursuant to such contract, Plaintiff, subsequent to October 31st, 1959, and during the months of November and December, 1959, and January, 1960, sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for and on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.p.b. common carriers at Salt Lake City in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the times of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic

Energy Commission has not been the holder of an uncan-  
celed Idaho dealer permit.

### V.

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code, as amended by an Act of the Legislature of the [fol. 11] State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the aforementioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its afore-mentioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the afore-mentioned contract and by such Atomic Energy Commission transported into the State of Idaho:

1. The sum of \$5,775.48 paid on January 6th, 1960, for 96,258 taxable net gallons of gasoline so sold and delivered during the month of November, 1959;
2. The sum of \$8,289.36 paid on January 21st, 1960, for 138,156 taxable net gallons of gasoline so sold and delivered during the month of December, 1959; and
3. The sum of \$8,349.48 paid on February 24th, 1960, for 139,158 taxable net gallons of gasoline so sold and delivered during the month of January, 1960.

### VI.

That each and all of such payments were made involuntarily, under duress, and in fear of penalties, pains and forfeitures which Plaintiff might have incurred under the [fol. 12] provisions of Title 49, Chapter 12 of the Idaho



4  
Code, had it refused to make such payments. With each payment Plaintiff submitted to the Defendant a written notice of protest stating that the taxes exacted were illegal for a number of reasons, including the following:

- "1. The gasoline is sold and delivered to the Atomic Energy Commission f.o.b. Salt Lake City, Utah.
2. The State of Idaho has no authority to assess the tax against the Utah Oil Refining Company based upon an activity which takes place outside the borders of Idaho.
3. The gasoline is the property of the United States as and when it enters Idaho.
4. The gasoline is the property of the United States during the entire period of its existence within Idaho."

That the collection of such taxes by Defendant was illegal and without right or authority.

#### VII.

That pursuant to and in full compliance with the terms and provisions of Chapter 12 of Title 49 of the Idaho Code, as amended, Plaintiff has made timely application for a refund of the taxes paid by it under protest; that such application for refund has been denied, refused and rejected by the Defendant.

#### VIII.

The provisions of Section 49-1201(g)2, Idaho Code, as amended, which state:

"... motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not [fol. 13] the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such

motor fuel, immediately after the imported motor fuel had been unloaded in the state of Idaho . . . ”

along with the provisions of the Idaho Code which render the ‘receipt’ of motor fuel as so defined subject to taxation are invalid and unconstitutional because such provisions attempt to fix a tax upon or by reason of events occurring entirely outside of the jurisdiction of the State of Idaho, contrary to due process of law. These provisions are also invalid and unconstitutional as arbitrary, capricious and discriminatory class legislation contrary to the guaranty of Equal Protection of the Laws. Taxability under such provisions is determined by the fortuitous circumstances of whether the out-of-state sellers, who are not Idaho licensed dealers, are not subjected to taxation for the sale and delivery of gasoline under the same or similar circumstances as those for which the Defendant has exacted from the Plaintiff the taxes in question.

#### IX.

— The provisions of Title 49, Chapter 12, Idaho Code, as amended, and particularly the provisions of Sections 49-1201 and 49-1210, Idaho Code, under which Defendant has demanded and collected the aforesaid taxes from Plaintiff are illegal and void. Such provisions, as applied and enforced by the Defendant violate the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States; the Due [fol. 14] Process Clause of the Constitution of the State of Idaho, Article I, Sec. 13; the Commerce Clause of the Constitution of the United States, Article I, Section 8, Cl. 3; and the Supremacy Clause of the Constitution of the United States, Article VI, Cl. 2.

#### X.

There is no lawful right or authority whatsoever for imposition of the taxes in question upon Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plain-

tiff for the sums so paid and collected, as stated in paragraph V of this complaint.

Wherefore, the Plaintiff prays for judgment as follows:

1. That it do have and recover from Defendant the sum of \$22,414.32, together with interest thereon at the rate of six (6%) per cent per annum from the respective dates of payment of said taxes;

2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, of the Idaho Code, as amended, unconstitutional and of no force and effect;

3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seem mete and just in the premises.

Calvin Dworshak, 326 Bank of Idaho Building, Boise, Idaho, Attorney for Plaintiff.

[fol:17]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MOTION TO DISMISS—Filed April 4, 1960

Comes Now, the Defendant, P. G. Neill, Tax Collector of the State of Idaho, and respectfully moves this Court in the above entitled matter to dismiss the complaint of the Plaintiff on file herein, and as grounds and reasons therefor states:

That said complaint does not state a claim against the Defendant upon which relief can be granted.

Dated This 4th day of April, 1960.

Frank L. Benson, Attorney General of the State of Idaho, By Robert E. Bakes, Assistant Attorney General, Assigned to the Office of Tax Collector, Attorneys for the Defendant.

[fol. 20]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ORDER AMENDING COMPLAINT—April 5, 1960

Upon the reading and filing of the Stipulation between Plaintiff and Defendant dated the 28th day of March, 1960, and good cause appearing therefor, it is hereby

Ordered That the Plaintiff's complaint filed herein upon the 14th day of March, 1960, by, and it hereby is, amended by interlineation of the words "seller happens to be an Idaho licensed dealer while out-of-state", which words are inserted in line 2 of the last sentence of paragraph VIII of the said complaint on page 6 thereof, so that said sentence as amended does hereby read as follows, to-wit:

"Taxability under such provisions is determined by the fortuitous circumstances of whether the out-of-state seller happens to be an Idaho licensed dealer while out-of-state sellers, who are not Idaho licensed dealers, are not subjected to taxation for the sale and delivery of gasoline under the same or similar circumstances as those for which the Defendant has exacted from the Plaintiff the taxes in question."

Dated This 5 day of April, 1960.

Merlin S. Young, District Judge.

[fol. 27]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

SUPPLEMENTAL COMPLAINT—Filed May 31, 1960

Comes Now, The Plaintiff, and by leave of the Court first had and obtained, files this its supplemental complaint herein, and alleges:

I.

That since the filing of the complaint herein and the amendment thereto the following facts in reference to the

cause of action stated in the complaint as amended and affecting the said cause of action have arisen.

## II.

That pursuant to the contract set forth and alleged in paragraph III of the complaint on file herein, the Plaintiff during the months of February and March, 1960, sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for an on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes, for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.o.b. common carriers at Salt Lake City in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the times of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit.

## III.

[fol. 28] That the Defendant has contended and still contends that by reason and by Virtue of Title 49, Chapter 12 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the aforementioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its aforementioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for



gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the above-mentioned contract and by such, Atomic Energy Commission transported into the State of Idaho:

1. The sum of \$7,403.28 paid on March 24th, 1960, for 123,388 taxable net gallons of gasoline so sold and delivered during the month of February, 1960; and
2. The sum of \$8,277.42 paid on April 22nd, 1960, for 137,957 taxable net gallons of gasoline so sold and delivered during the month of March, 1960.

[fol. 31]

### VIII:

There is no lawful right or authority whatsoever for imposition of the taxes in question upon the Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plaintiff for the sums so paid and collected, as stated in paragraph III of this supplemental complaint.

Wherefore, The Plaintiff prays judgment as follows:

1. That it do have and recover from Defendant the additional sum of \$15,680.70, together with interest thereon at the rate of six (6%) per cent per annum from the respective dates of payment of said taxes;
2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, of the Idaho Code, as amended, unconstitutional and of no force and effect;
3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seems mete and just in the premises.

Calvin Dworshak, 326 Bank of Idaho Building, Boise, Idaho, Attorney for Plaintiff.

[fol. 32] Acknowledgment of service (omitted in printing).

[fol. 39]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

## SECOND SUPPLEMENTAL COMPLAINT—Filed July 12, 1960

Comes Now the Plaintiff, and by leave of the Court first had and obtained, files this its second supplemental complaint herein, and alleges:

## I

That since the filing of the complaint herein, and the amendment and supplement thereto, the following facts in reference to the cause of action stated in the complaint as amended and supplemented and affecting the said cause of action have arisen.

## II

That pursuant to the contract set forth and alleged in Paragraph III of the complaint on file herein, the Plaintiff during the months of April and May, 1960 sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for and on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes, for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.o.b. common carriers at Salt Lake City in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the times of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit.

[fol. 40]

## III

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code as amended by an Act of the Legislature of the State

of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168, et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the afore-mentioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its afore-mentioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the above-mentioned contract and by such Atomic Energy Commission transported into the State of Idaho:

1. The sum of \$6,541.56 paid on or about May 23rd, 1960, for 109,026 taxable net gallons of gasoline so sold and delivered during the month of April, 1960; and
2. The sum of \$7,171.92 paid on or about June 21st, 1960, for 119,532 taxable net gallons of gasoline so sold and delivered during the month of May, 1960.

[fol. 43]

### VIII

There is no lawful right or authority whatsoever for imposition of the taxes in question upon the Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plaintiff for the sums so paid and collected, as stated in Paragraph III of this second supplemental complaint.

Wherefore, the Plaintiff prays judgment as follows:

1. That it do have and recover from the Defendant the additional sum of \$13,713.48, together with interest thereon at the rate of six (6%) per cent per annum from the respective dates of payment of said taxes;
2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, of the Idaho Code, as amended, unconstitutional and of no force and effect;

3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seems mete and just in the premises.

Calvin Dworshak, 326 Bank of Idaho Building, Boise, Idaho, Attorney for Plaintiff.

[fol. 44] Acknowledgment of service (omitted in printing).

[fol. 49].

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

THIRD SUPPLEMENTAL COMPLAINT—Filed September 6, 1960

Comes Now the Plaintiff, and by leave of the Court first had and obtained, files this its third supplemental complaint herein, and alleges:

I

That since the filing of the complaint herein, and the amendment and supplements thereto, the following facts in reference to the cause of action stated in the complaint as amended and supplemented and affecting the said cause of action have arisen.

II

That pursuant to the contract set forth and alleged in Paragraph III of the complaint on file herein, the Plaintiff during the months of June and July, 1960 sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for and on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes, for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.o.b. common carriers at Salt Lake City, in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the times of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic

Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit.

[fol. 50]

### III

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168, et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the afore-mentioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its afore-mentioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the above-mentioned contract and by such Atomic Energy Commission transported into the State of Idaho:

1. The sum of \$7,143.90 paid on or about July 20th, 1960, for 119,065 taxable net gallons of gasoline so sold and delivered during the month of June, 1960; and
2. The sum of \$6,157.14 paid on or about August 22nd, 1960, for 102,619 taxable net gallons of gasoline so sold and delivered during the month of July, 1960.

[fol. 53]

### VIII

That is no lawful right or authority whatsoever for imposition of the taxes in question upon the Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plain-



tiff for the sums so paid and collected, as stated in Paragraph III of this third supplemental complaint.

Wherefore, Plaintiff prays judgment as follows:

1. That it do have and recover from the Defendant the additional sum of \$13,301.04, together with interest thereon at the rate of six (6%) per cent per annum from the respective dates of payment of said taxes;

2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, Idaho Code, as amended, unconstitutional and of no force and effect;

3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seems mete and just in the premises.

Calvin Dworshak, Boise, Idaho, Attorney for Plaintiff.

Acknowledgment of service (omitted in printing).

[fol. 60]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

FOURTH SUPPLEMENTAL COMPLAINT

—Filed November 4, 1960

Comes Now, the Plaintiff, and by leave of the Court first had and obtained, files this its fourth supplemental complaint herein, and alleges:

# I

That since the filing of the complaint herein, and the amendment and supplements thereto, the following facts in reference to the cause of action stated in the complaint as amended and supplemented and affecting the said cause of action have arisen.

## II

That pursuant to the contract set forth and alleged in paragraph III of the complaint on file herein, the Plaintiff during the months of August and September, 1960 sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for and on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes, for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.o.b. common carriers at Salt Lake City, Utah in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the times of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit.

[Vol. 61]

## III

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah by the Plaintiff pursuant to the aforementioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its aforementioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the above-mentioned contract and

by such Atomic Energy Commission transported into the State of Idaho:

1. The sum of \$7,556.94 paid on or about September 21st, 1960, for 125,949 taxable net gallons of gasoline so sold and delivered during the month of August, 1960; and

2. The sum of \$6,455.10 paid on or about October 24, 1960, for 107,585 taxable net gallons of gasoline so sold and delivered during the month of September 1960.

[fol. 64]

## VIII

That there is no lawful right or authority whatsoever for imposition of the taxes in question upon the Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plaintiff for the sums so paid and collected, as stated in Paragraph III of this fourth supplemental complaint.

Wherefore, Plaintiff prays judgment as follows:

1. That it do have and recover from the Defendant the additional sum of \$14,012.04, together with interest thereon at the rate of six per cent per annum from the respective dates of payment of said taxes;

2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, Idaho Code, as amended, unconstitutional and of no force and effect;

3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seems mete and just in the premises.

Calvin Dworshak, Boise, Idaho, Attorney for Plaintiff.

[fol. 65] Acknowledgment of service (omitted in printing).

[fol. 69]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

FIFTH SUPPLEMENTAL COMPLAINT

—Filed December 2, 1960

Comes Now, The Plaintiff, and by leave of the Court first had and obtained, files this its fifth supplemental complaint herein, and alleges:

I.

That since the filing of the complaint herein, and the amendment and supplements thereto, the following facts in reference to the cause of action stated in the complaint as amended and supplemented and affecting the said cause of action have arisen.

II.

That pursuant to the contract set forth and alleged in paragraph III of the complaint on file herein, the Plaintiff during the month of October, 1960, sold and delivered to the Atomic Energy Commission certain quantities of gasoline, for and on account of which the Defendant has unlawfully exacted from Plaintiff the payment of motor fuel taxes, for which Plaintiff prays recovery in this action. Such gasoline was sold and delivered to the Atomic Energy Commission f.o.b. common carriers at Salt Lake City, in the State of Utah. Title to such gasoline passed to the Atomic Energy Commission at the time of delivery. By common carriers selected and paid by the Atomic Energy Commission the gasoline was transported into the State of Idaho and placed in storage tanks owned by the Atomic Energy Commission for use in its governmental operations. At all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels and the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit.

[fol. 70]

III.

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12, Idaho Code,

as amended, by an Act of the Legislature of the State of Idaho, approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168, et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the aforementioned contract and imported into the State of Idaho by the Atomic Energy Commission for use in its aforementioned plants and facilities. After demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sum for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the above-mentioned contract and by such Atomic Energy Commission transported into the State of Idaho:

The sum of \$7,059.72 paid on or about November 22nd, 1960, for 117,662 taxable net gallons of gasoline so sold and delivered during the month of October, 1960.

[fol. 73]

### VIII.

That there is no lawful right or authority whatsoever for imposition of the taxes in question upon Plaintiff. The Defendant, in demanding and collecting the aforesaid sums of money from Plaintiff as taxes was acting without lawful right or authority and the Defendant is indebted to Plaintiff for the sums so paid and collected, as stated in paragraph III of this fifth supplemental complaint.

Wherefore, Plaintiff prays judgment as follows:

1. That it do have and recover from the Defendant the additional sum of \$7,059.72, together with interest thereon at the rate of six (6%) per cent per annum from the date of payment of said taxes;
2. That this Honorable Court declare the aforesaid provisions of Chapter 12, Title 49, Idaho Code, as amended, unconstitutional and of no force and effect;



3. For its costs and expenses necessarily incurred herein and for such other and further relief as to this Honorable Court seems mete and just in the premises.

Calvin Dworshak, Boise, Idaho, Attorney for Plaintiff.

Acknowledgment of service (omitted in printing).

[fol.74] COPY

COMPTROLLER GENERAL OF THE  
UNITED STATES

WASHINGTON

B:105908

November 5, 1961\*

Chairman  
Atomic Energy Commission

My dear Mr. Chairman:

Reference is made to letter dated October 1, 1951, from the Controller, Atomic Energy Commission, inquiring as to the propriety of the Commission paying the Idaho motor fuel tax in view of the decision of *Union Pacific Railroad Company v. Riggs*, 66 Idaho 677: 166 P. (2d) 926, rehearing denied March 26, 1946, wherein the Idaho Supreme Court "indicated" that the subject motor fuel tax is a tax upon the purchaser, exacted from those who use the highways.

The letter is in effect a request for a decision, in view of which your attention is invited to the provisions of section 8 of the act of July 31, 1894, as amended, 31 U.S.C. 74, which authorizes decisions in a matter like this only upon the request of the head of a department or establishment of the Government, and to circular letter of this Office dated

\* This document is erroneously dated November 5, 1961, in the typewritten record on file with this Court. The parties agree that the correct date, as shown by the document on file with the Supreme Court of the State of Idaho, is November 5, 1951.

December 13, 1946, B-62476, 26 Comp. Gen. 993. However, in this particular instance, the matter will be treated as a submission by you.

It is stated that, in view of the above referred-to decision, the Commission protested collection from it of the motor fuel tax and filed claim for refund of such taxes theretofore collected by the State but that the claim was disapproved by the State Board of Examiners upon advice from the Attorney General of the State of Idaho to the effect that the decision of this office dated June 22, 1945, B-50169, 24 Comp. Gen. 919, was controlling and therefore [fol. 75] purchases of gasoline and motor fuel by the Idaho Operations Office of the Commission were subject to the Idaho motor fuel tax. In the absence of contrary information in the letter of October 1, and in view of the provisions in the Motor Fuel Excise Tax Act (Title 49, Idaho Code, Sections 701-727) for refund of such tax when the motor fuel purchased was not used in connection with travel on the state highways, it is assumed that the question is limited to the propriety of paying the subject tax on motor fuel purchased by the Commission for use in propelling its vehicles over the state highways.

The Idaho Supreme Court held in the Union Pacific Railroad case, *supra*, that "the motor vehicle fuels tax is not a tax for general purposes, but a privilege tax, a tax exacted from those who use the highways." (Underscoring supplied.) Determinations of the incidence of a tax by the State Court are controlling—*Federal Land Bank v. Bismarck Company*, 314 U.S. 95, 99, and if the above underscored portion can be said to decide that the legal incidence of such tax is upon the consumer who uses the highways, then the Atomic Energy Commission, as an agency of the Federal Government, would be immune from such a direct tax.

In the decision of this Office dated June 22, 1945, *supra*, it was stated that—

"The Idaho Motor Fuels Tax Law (Chapter 46, Sessions Laws, 1933, as amended), provides, in pertinent part, that—

“... each and every dealer, as defined in this Act shall, not later than the fifteenth day of each calendar month render a statement to the Commissioner of Law Enforcement of the State of Idaho of all motor fuels sold, distributed, and/or used by him or them in the State of Idaho during the preceding calendar month, and pay an excise tax of six cents [fol. 76] per gallon on all motor fuels as shown by such statement ...”

and there is nothing in the law purporting to require dealers in motor fuels to increase the cost of fuel sold to the United States or other purchasers for the purpose of collecting the tax. In other words, the tax is not laid upon the purchasers of motor fuel in Idaho but is merely a privilege tax imposed upon persons engaging in the motor fuel business within that State; and, since the tax is not to be regarded as being passed on, as such, to a vendee because the purchase price of the fuel involved in a particular case includes an amount representing a charge on account of the tax, it cannot be said that the incidence of the tax rests upon the vendee.”

The express provision is the tax law that the *dealer* is to pay to the state “an excise tax of six cents per gallon on all motor fuels,” without specifically requiring that it be passed on appears to justify the conclusion that the incidence of the tax is on the vendor in the absence of a determination by the Supreme Court of Idaho to the contrary. In this connection, the term “exactd from those who use the highways,” as used by the Supreme Court of Idaho in describing the tax as a privilege tax and not a tax for general purposes, would seem to have reference only to the *practical results* of its imposition upon the dealers. The question as to the “incidence” of the tax was not under consideration in that case. It has been settled by the Supreme Court of the United States that the right of the Government to be free of taxation by the States does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government

and who have been granted no tax immunity. *Alabama v. King & Boozer*, 314 U.S. 1, and cases cited therein. Since it appears that the tax here involved is not a direct tax upon [fol. 77] the Government but is passed on by the dealers as a part of the cost of motor fuel, the fact that it results in increasing the Government's costs of operations will not provide immunity therefrom.

In view of the foregoing, there is not perceived anything in the decision of the Supreme Court of Idaho in the Union Pacific Railroad Company case, *supra*, which would alter the conclusion of this Office in the decision of June 22, 1945, *supra*.

Sincerely yours,

/s/ LINDSAY C. WARREN  
Comptroller General of the United States

[fol. 78]

DECISIONS OF THE COMPTROLLER GENERAL

919

out of, or be regarded as part of, the 15 percent to which it is entitled under the said article 4(b) (4).

Consequently, if correct in other respects, there appears proper for payment under the change order involved, the sum of \$341.56, computed as follows:

Cost of labor, materials and equipment \$215.91,	
\$61.56 and \$13.87 .....	\$291.34
15% as overhead and profit .....	43.70
Unemployment and Social Security Tax .....	6.52
Total .....	\$341.56

The papers are returned herewith.

(B-50169)

**Taxes—State—Gasoline—Purchases in Idaho**

The gasoline tax imposed by the State of Idaho, the legal incidence of which is on the vendor, may be reimbursed to a contractor furnishing service station deliveries of gasoline to the United States under a contract providing that the tax-exclusive contract price be increased by the amount of taxes for which exemption is not granted, where gasoline was furnished in such quantities (300 gallons or less) as not to be within the exemptive provisions of the taxing statute; and, as the United States has no claim for refund from the State of the tax so reimbursed, exemption certificates need not be required of the contractor.

Comptroller General Warren to Ben A. Guderian, Department of Agriculture, June 22, 1945:

I have your letter of May 28, 1945, with enclosures, as follows:

[fol. 79] The attached Bureau Voucher Number 17129 in favor of the Continental Oil Company in the amount of \$15.08 has been presented to the undersigned for certification.

Included in the amount of this voucher is the Six Cents per gallon Idaho State Tax as provided in Chapter 163 of the 1945 Idaho Sessions Laws, Approved March 16, 1945. Section 18(d) of this Chapter reads as follows:

"Sales of motor fuels for the use of the United States of America in quantities in excess of 300 gallons and not otherwise are expressly exempted from the provisions of Chapter 46, 1933 Session Laws as amended heretofore and hereby."

This exemption applies to both service station and bulk deliveries.

Schedule No. 1, Class 7—Gasoline, Special Conditions, Paragraph 11 (c) (3), governing Contract No. TPS-66835 under which this procurement was consummated, reads as follows:

"If on or after the date set for the opening of bids the appropriate tax official of any state or local govern-



ment should authoritatively refuse to accept, in lieu of the payment of any applicable tax, exemption certificates issuable to the contractor hereunder with respect to such tax, on the grounds that any or all sales to the Government are not, as such, exempt from tax, then and in that event the amount otherwise payable to the contractor with respect to the sales affected thereby shall be increased by the amount of the tax. In consideration of such increase, the bidder agrees fully to cooperate with the Government to execute such forms or documents as may be required by the Government, and to take such steps as may be requested by the Government in order to preserve to the Government any and all rights to the refund of such taxes, and to [fol. 80] assist the Government in any proceedings brought for recovery thereof by litigation or otherwise."

In your decision B-43591, dated August 23, 1944, (24 Comp. Gen. 150) it was ruled that if the legal incidence of the tax prescribed by each of those statutes is upon the vendor rather than upon the vendee, there is no reasonable basis on which the United States may seek a refund from any of those States of the charge it is required to pay on account of the applicable tax in the case of service station deliveries of gasoline in said States and that no useful purpose would be served by requiring vendors to execute tax exemption certificates covering such charges.

I am unable to determine if the legal incidence of the tax prescribed by this statute is upon the vendor rather than the vendee. Copy of the State of Idaho Motor Fuels Tax Law, Chapter 46, Laws of 1933, as amended, and a copy of Chapter 163 of the 1945 Idaho Session Laws, Approved March 16, 1945, are enclosed.

Your advice is requested whether I may certify this voucher in the full amount, including the Idaho State Tax, if otherwise being correct. If your answer is in the affirmative, should we require the vendors to execute tax exemption certificates covering such charges as provided in Paragraph 11(c) (3) of Class 7 of General Schedule of Supplies.

Since we have a number of similar vouchers on hand, your early reply would be appreciated.

It appears from the instant voucher and supporting papers that the gasoline here involved was procured at various places in the State of Idaho during the period March 22 to April 13, 1945, in quantities ranging from 2 quarts to 10 gallons for use in connection with the operation of Government-owner motor vehicles by employees of the Soil Conservation Service of the Department of Agriculture. Moreover, while an examination of the subject contract—providing as it does for service-station deliveries of certain types of gasoline and lubricating oil in various States during the fiscal year 1945 by the contractor and its authorized dealers to "Government-owned or operated motor vehicles"—discloses that the prices specified therein for the gasoline procured thereunder in Idaho did not include an item representing the State tax and that U.S. Tax Exemption Certificates would be furnished with respect thereto, it is apparent that the contractual provisions which are quoted in your letter require the Government to pay the contractor a charge equivalent to the tax, in addition to the specified prices, in all cases where the contractor was legally obligated to comply with the demand of the taxing authorities for the payment of the tax.

In the decision of August 23, 1944, of this office to the Postmaster General, 24 Comp. Gen. 150, to which you refer, it was stated that—

• • • the language used by the Supreme Court of the United States in its decision in the case of *Alabama v. King & Boozer*, 314 U.S. 1, leaves no room for doubt that a person who sells supplies to the United States is not—merely because of the immunity of the Federal Government from state taxation—exempt from the payment of an otherwise applicable State tax where it appears that the legal incidence of the tax rests upon him as the vendor and not upon the United States as the vendee. Hence, payment properly may be required by a State from a vendor of a tax of that type in the case of such sales to the United States as are consummated within the territorial jurisdiction of the State unless the State law or the regulations promulgated by the State taxing authorities with respect thereto except

the transactions from the operation of the taxing statute involved.

[fol. 82] The Idaho Motor Fuels Tax Law (Chapter 46, Session Laws, 1933, as amended), provides, in pertinent part, that—

“ \* \* \* each and every dealer, as defined in this Act shall, not later than the fifteenth day of each calendar month render a statement to the Commissioner of Law Enforcement of the State of Idaho of all motor fuels sold, distributed, and/or used by him or them in the State of Idaho during the preceding calendar month, and pay an excise tax of six cents per gallon on all motor fuels as shown by such statement \* \* \* ”

and, there is nothing in the law purporting to require dealers in motor fuels to increase the cost of fuel sold to the United States or other purchasers for the purpose of collecting the tax. In other words, the tax is not laid upon the purchasers of motor fuel in Idaho but is merely a privilege tax imposed upon persons engaging in the motor fuel business within that State; and, since the tax is not to be regarded as being passed on, as such, to a vendee because the purchase price of the fuel involved in a particular case includes an amount representing a charge on account of the tax, it cannot be said that the incidence of the tax rests upon the vendee.

Also, while it is understood that prior to the time the Idaho Motor Fuels Tax Law was amended by Chapter 163, Session Laws, 1945, approved March 16, 1945, the taxing authorities of that State did not insist upon the payment of the State tax in connection with gasoline procured for governmental purposes, yet, the provisions of the amendatory act which are set forth in your letter clearly show that the Legislature of Idaho intended that the tax should be no less applicable in the case of gasoline sold in quantities of 300 gallons or less for the use of the United States than in the case of gasoline sold for other purposes. And there [fol. 83] is no reason to suppose that the taxing authorities of Idaho will not regard the said statutory provisions as requiring the collection by them of the applicable tax in

connection with service station deliveries of the type here involved.

In view of the foregoing, it must be concluded that the contractor here involved cannot obtain exemption from the payment of the State tax on the gasoline covered by the instant voucher and that the Government would not be justified in refusing to pay the contractor a charge equivalent to the tax in addition to the price otherwise fixed for the gasoline.

Accordingly, you are advised that certification for payment of the instant voucher—which together with related papers is returned herewith—is authorized, if correct in other respects; and, since no reasonable basis is apparent for a claim by the United States for a refund from the State of Idaho of the amount paid to the contractor on account of the tax, it will not be necessary to require the contractor to execute a U.S. Tax Exemption Certificate with respect to the tax.

[fol. 118]

BEFORE THE TAX COLLECTOR OF THE STATE OF IDAHO

ATTACHMENT TO APPLICATIONS FOR REFUND—  
November 1959

#### SCHEDULE II—MOTOR FUEL TAX REPORT

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending November 30, 1959 by Utah Oil Refining Company, Salt Lake City, Utah.

(The 98,222 gallons of motor fuel listed on this Schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, f.o.b. Salt Lake City Utah pursuant to the terms of General Services Administration Contract No. CS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any pro-

vision thereof shall be deemed an admission of liability for the tax. By separate Notice of Paying Motor Fuel Tax under Protest, dated January 6, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$5,775.48.)

Name of Distributing Station & Date of Invoice	Tank Car No. and Invoice No.	Name of Purchaser	Address	Transportation Company	Gallons Motor Fuels
2 Nov.	T 27626	Phillips Petrol. A.E.C.	Seeville	P.I.E.	8,596
4 Nov.	T 27627	" "	Seeville	"	8,635
5 Nov.	T 27616	" "	Idaho Falls	"	7,623
8 Nov.	T 27628	" "	Seeville	"	8,628
11 Nov.	T 27617	" "	Idaho Falls	"	7,600
11 Nov.	T 27629	" "	Scoville	"	8,410
15 Nov.	T 27630	" "	Scoville	"	8,480
17 Nov.	T 27631	" "	Scoville	"	8,611
19 Nov.	T 28618	" "	Idaho Falls	"	7,712
20 Nov. [fol. 119]	T 27632	" "	Scoville	"	8,622
24 Nov.	T 27619	" "	Idaho Falls	"	7,645
26 Nov.	T 27620	" "	Idaho Falls	"	7,660

TOTAL importations into the State of Idaho carried to line 2 of Form MF-1000

98,222

[fol. 124]

# SCHEDULE II—MOTOR FUEL TAX REPORT—December 1959

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc., located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending December 31, 1959 by Utah Oil Refining Company.

Address of Dealer: Salt Lake City, Utah.



Date of Invoice	Invoice Number	Name of Purchaser	Address	Trans. Co.	Gallons Motor Fuel
1 Dec.	T 27633	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,445
1 Dec.	T 27634	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,532
3 Dec.	T 27635	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,486
4 Dec.	T 27621	Phillips Petroleum Co. A.E.C.	Idaho Falls	P.I.E.	7,674
8 Dec.	T 29370	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,601
8 Dec.	T 29371	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,613
8 Dec.	T 29421	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,492
11 Dec.	T 29372	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,694
11 Dec.	T 27622	Phillips Petroleum Co. A.E.C.	Idaho Falls	P.I.E.	7,692
15 Dec.	T 29373	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	7,924
18 Dec.	T 63926	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,473
18 Dec.	T 27623	Phillips Petroleum Co. A.E.C.	Idaho Falls	P.I.E.	7,683
21 Dec.	T 29375	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,601
22 Dec.	T 29376	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,723
27 Dec.	T 27624	Phillips Petroleum Co. A.E.C.	Idaho Falls	P.I.E.	7,983
28 Dec.	T 29377	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	8,637
30 Dec.	T 29378	Phillips Petroleum Co. A.E.C.	Scoville	P.I.E.	7,723

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000

140,976

(The 140,976 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration contract No. GS-10S-14022, Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying Motor Fuel Tax under protest, dated January 21, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$8,289.36.

[fol. 130]

**SCHEDULE II—MOTOR FUEL TAX REPORT—January 1960**

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending January, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Name of Distributing Sta. & Date of Inv.	Invoice No.	Name of Purchaser	Address	Transp. Co.	Gallons
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(The 141,998 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this schedule II or the attached form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying motor fuel tax under protest, dated February 24, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$8,349.48.)

2	T 29379	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,757
3	T 27625	Phillips Petroleum Co. A.E.C.	Idaho Falls	Clark	8,440
5	T 29380	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,611
10	T 29381	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,598
10	T 31609	Phillips Petroleum Co. A.E.C.	Idaho Falls	Clark	7,582
12	CM 1690	Phillips Petroleum Co. A.E.C.	Scoville	Clark	200
12	T 29382	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,263
15	T 29383	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,552
17	T 31610	Phillips Petroleum Co. A.E.C.	Idaho Falls	Clark	8,552
19	T 29384	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,644
[fol. 131]					
19	T 29385	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,389
20	T 32381	General Electric Co. A.E.C.	Scoville	P.I.E.	8,648
21	T 29387	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,445
24	T 31611	Phillips Petroleum Co. A.E.C.	Idaho Falls	Clark	7,627
25	T 29388	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,573
25	T 29389	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,329
27	T 32767	Phillips Petroleum Co. A.E.C.	Scoville	Clark	8,517
31	T 31612	Phillips Petroleum Co. A.E.C.	Idaho Falls	Clark	7,701

TOTAL importations into the State of Idaho carried to Line  
2 of Form MF-1000

141,998

[fol. 137]

## SCHEDULE II—MOTOR FUEL TAX REPORT—February 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending February 29, 1960 by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 125,906 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the Motor Fuel Tax on such motor fuel and neither the preparation nor execution of this schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying Motor Fuel Tax Under Protest, dated March 24, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$7,403.28.)

1	T 32769	Atomic Energy Comm.	Salt Lake City	Clark	8,299
3	T 32770	" "	" "	" "	8,304
7	T 31614	" "	" "	" "	7,707
7	T 32771	" "	" "	" "	8,608
9	T 34409	" "	" "	P.I.E.	8,669
9	T 32772	" "	" "	Clark	8,596
11	T 32773	" "	" "	" "	8,495
12	T 31613	" "	" "	" "	7,691
15	T 32776	" "	" "	" "	8,608
18	T 32777	" "	" "	" "	8,602
21	T 31615	" "	" "	" "	7,687
23	T 32778	" "	" "	" "	8,603
[fol. 138]					
25	T 32779	" "	" "	" "	8,608
28	T 31616	" "	" "	C & T	8,664
28	T 32780	" "	" "	" "	8,765

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000

125,906

[fol. 142]

**SCHEDULE II—MOTOR FUEL TAX REPORT—March 1960**

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending March 31, 1960, by Utah Oil Refining Company Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 141,269 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying motor fuel tax under protest, dated April 22, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$8,277.42.)

1	T 32781	Atomic Energy Commission	Salt Lake City	C & T	8,796
2	T 32782	Atomic Energy Commission	Salt Lake City	C & T	8,616
4	T 35638	Atomic Energy Commission	Salt Lake City	C & T	7,707
5	T 32783	Atomic Energy Commission	Salt Lake City	C & T	8,676
7	T 32785	Atomic Energy Commission	Salt Lake City	C & T	8,725
9	T 32786	Atomic Energy Commission	Salt Lake City	C & T	8,709
11	T 31617	Atomic Energy Commission	Salt Lake City	C & T	7,686
13	T 32787	Atomic Energy Commission	Salt Lake City	C & T	8,580
16	T 35980	Atomic Energy Commission	Salt Lake City	C & T	8,580



18	T 31618	Atomic Energy Commission	Salt Lake City	C & T	7,664
20	T 35981	Atomic Energy Commission	Salt Lake City	C & T	8,507
[fol. 143]					
22	T 35982	Atomic Energy Commission	Salt Lake City	C & T	8,506
25	T 31619	Atomic Energy Commission	Salt Lake City	C & T	7,605
25	T 35983	Atomic Energy Commission	Salt Lake City	C & T	7,582
30	T 35984	Atomic Energy Commission	Salt Lake City	C & T	8,644
31	T 37725	Atomic Energy Commission	Salt Lake City	P I E	8,015
31	T 35985	Atomic Energy Commission	Salt Lake City	C & T	8,671

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000 141,269

[fol. 149]

#### SCHEDULE II—MOTOR FUEL TAX REPORT—April 1960.

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending April 30, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 111,251 gallons of motor fuel listed on this Schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. FS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for

the tax. By separate notice of paying motor fuel tax under protest, dated May 23, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$6,541.56.)

3	T 31620	Atomic Energy Commission	Salt Lake City	C&T	8,065
3	T 35986	" "	" "	C&T	8,484
6	T 35987	" "	" "	C&T	8,610
10	T 35988	" "	" "	C&T	8,592
11	T 31621	" "	" "	C&T	8,534
13	T 35989	" "	" "	C&T	8,614
17	T 35990	" "	" "	C&T	8,668
19	T 31622	" "	" "	C&T	8,658
20	T 35991	" "	" "	C&T	8,594
24	T 35992	" "	" "	C&T	8,700
25	T 35993	" "	" "	C&T	8,539
[fol. 150]					
28	T 31623	" "	" "	C&T	8,565
28	T 35994	" "	" "	C&T	8,628

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000 111,251

[fol. 155]

#### SCHEDULE II—MOTOR FUEL TAX REPORT—May 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending May 31, 1960 by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 121,971 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax.

By separate notice of paying motor fuel tax under protest dated April 23rd 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$7,171.92.)

3	T 31624	Atomic Energy Commission	Salt Lake City	P.I.E.	8,547
6	T 31625	Atomic Energy Commission	Salt Lake City	P.I.E.	7,590
6	T 35995	Atomic Energy Commission	Salt Lake City	P.I.E.	7,582
10	T 35996	Atomic Energy Commission	Salt Lake City	P.I.E.	8,433
10	T 35997	Atomic Energy Commission	Salt Lake City	P.I.E.	8,418
16	T 31526	Atomic Energy Commission	Salt Lake City	P.I.E.	8,497
16	T 35998	Atomic Energy Commission	Salt Lake City	P.I.E.	8,571
16	T 35999	Atomic Energy Commission	Salt Lake City	P.I.E.	8,428
18	T 41827	Atomic Energy Commission	Salt Lake City	P.I.E.	8,495
19	T 36000	Atomic Energy Commission	Salt Lake City	P.I.E.	8,448
22	T 41801	Atomic Energy Commission	Salt Lake City	P.I.E.	8,468
[fol. 156]					
23	T 31627	Atomic Energy Commission	Salt Lake City	P.I.E.	7,576
24	T 41802	Atomic Energy Commission	Salt Lake City	P.I.E.	7,566
27	T 41803	Atomic Energy Commission	Salt Lake City	P.I.E.	7,733
31	T 31628	Atomic Energy Commission	Salt Lake City	P.I.E.	7,619

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000

121,971

[fol. 161]

## SCHEDULE II—MOTOR FUEL TAX REPORT—June 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending June 30, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 121,495 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying motor fuel tax under protest dated July 20, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$7,143.90.)

1	T 41805	Atomic Energy Commission	Salt Lake City	P.I.E.	7,815
6	T 41807	Atomic Energy Commission	Salt Lake City	P.I.E.	8,099
8	T 43501	Atomic Energy Commission	Salt Lake City	P.I.E.	7,508
9	T 41808	Atomic Energy Commission	Salt Lake City	P.I.E.	8,407
13	T 41809	Atomic Energy Commission	Salt Lake City	P.I.E.	8,409
15	T 41810	Atomic Energy Commission	Salt Lake City	P.I.E.	8,490
15	T 43502	Atomic Energy Commission	Salt Lake City	P.I.E.	8,304
16	T 41811	Atomic Energy Commission	Salt Lake City	P.I.E.	8,184

16	T 41812	Atomic Energy Commission	Salt Lake City	P.I.E.	8,041
21	T 41831	Atomic Energy Commission	Salt Lake City	P.I.E.	7,804
22	T 43503	Atomic Energy Commission	Salt Lake City	P.I.E.	7,854
[fol. 162]					
24	T 41814	Atomic Energy Commission	Salt Lake City	P.I.E.	7,789
28	T 41815	Atomic Energy Commission	Salt Lake City	P.I.E.	8,282
29	T 41816	Atomic Energy Commission	Salt Lake City	P.I.E.	8,345
30	T 41247	Atomic Energy Commission	Salt Lake City	P.I.E.	8,164

TOTAL IMPORTATIONS into the State of Idaho carried to Line  
2 of Form MF-1000 121,495

[fol. 167]

#### SCHEDULE II—MOTOR FUEL TAX REPORT—July 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending July 31, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 104,713 gallons of motor fuel listed on this Schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the motor fuel tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying motor fuel tax under protest, dated August 22, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$6,157.14.)



4	T 41817	Atomic Energy Commission	Salt Lake City	P.I.E.	8,271
4	T 41818	Atomic Energy Commission	Salt Lake City	P.I.E.	8,311
5	T 41819	Atomic Energy Commission	Salt Lake City	Clark	8,361
6	T 43504	Atomic Energy Commission	Salt Lake City	Clark	7,474
11	T 44558	Atomic Energy Commission	Salt Lake City	Clark	8,159
22	T 43505	Atomic Energy Commission	Salt Lake City	Clark	7,850
17	T 41820	Atomic Energy Commission	Salt Lake City	Clark	7,364
18	T 44567	Atomic Energy Commission	Salt Lake City	Clark	7,502
20	T 44563	Atomic Energy Commission	Salt Lake City	Clark	8,422
20	T 44564	Atomic Energy Commission	Salt Lake City	Clark	8,324
25	T 43506	Atomic Energy Commission	Salt Lake City	Clark	8,154
[fol. 168]					
27	T 44578	Atomic Energy Commission	Salt Lake City	Clark	8,108
27	T 44565	Atomic Energy Commission	Salt Lake City	Clark	8,412

TOTAL importations into the State of Idaho carried to Line  
2 of Form MF-1000 104,713

[fol. 173]

## SCHEDULE II—MOTOR FUEL TAX REPORT—August 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending August 31, 1960 by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 128,519 gallons of motor fuel listed on this schedule II were sold and delivered to the Atomic Energy Commission, an Agency of the United States F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the Motor Fuel Tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of Paying Motor Fuel Tax Under Protest, dated August 20th 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$7,556.94.)

1	T 43507	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,149
1	T 44556	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,345
2	T 44566	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,394
7	T 44559	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,438
8	T 43510	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,164
11	T 44560	Atomic Energy Commission	Salt Lake City, Utah	Clark	7,418
16	T 43508	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,447
16	T 44561	Atomic Energy Commission	Salt Lake City, Utah	Clark	7,459

17	T 44568	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,425
21	T 47944	Atomic Energy Commission	Salt Lake City, Utah	P.I.E.	8,233
[fol. 174]					
22	T 44562	Atomic Energy Commission	Salt Lake City, Utah	Clark	7,427
23	T 46618	Atomic Energy Commission	Salt Lake City, Utah	Clark	7,423
25	T 43509	Atomic Energy Commission	Salt Lake City, Utah	Clark	7,418
25	T 46619	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,219
29	T 44569	Atomic Energy Commission	Salt Lake City, Utah	Clark	8,160
31	T 46620	Atomic Energy Commission	Salt Lake City, Utah	C&T	8,400

TOTAL importations into the State of Idaho carried to Line 2 of Form MF-1000 128,519

[fol. 179]

# SCHEDULE II—MOTOR FUEL TAX REPORT—September 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending September 30, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 109,781 gallons of motor fuel listed on this Schedule II were sold and delivered to the Atomic Energy Commission, an agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the Motor Fuel Tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for

the tax. By separate notice of paying Motor Fuel Tax Under Protest dated October 21, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$6,455.10.)

1	T 46604	Atomic Energy Commission	Salt Lake City	C&T	8,556
5	T 46621	Atomic Energy Commission	Salt Lake City	C&T	8,530
8	T 46622	Atomic Energy Commission	Salt Lake City	C&T	7,518
8	T 46623	Atomic Energy Commission	Salt Lake City	C&T	8,545
11	T 46606	Atomic Energy Commission	Salt Lake City	C&T	8,530
14	T 46632	Atomic Energy Commission	Salt Lake City	C&T	8,540
19	T 46607	Atomic Energy Commission	Salt Lake City	C&T	8,561
19	T 46624	Atomic Energy Commission	Salt Lake City	C&T	8,548
21	T 44570	Atomic Energy Commission	Salt Lake City	C&T	8,556
[fol. 180]					
22	T 46625	Atomic Energy Commission	Salt Lake City	C&T	8,545
26	T 46608	Atomic Energy Commission	Salt Lake City	C&T	8,456
26	T 46626	Atomic Energy Commission	Salt Lake City	C&T	8,556
29	T 46627	Atomic Energy Commission	Salt Lake City	C&T	8,540

Total importations into the State of Idaho carried to Line 2 of Form MF-1000 109,781

[fol. 185]

## SCHEDULE II—MOTOR FUEL TAX REPORT—October 1960

Statement of the number of gallons of motor fuels received from storage facilities, distributing stations, refineries, etc. located outside the State of Idaho, and imported or for importation into the State of Idaho for the month ending October 31, 1960, by Utah Oil Refining Company, Salt Lake City, Utah.

Date	Inv. No.	Purchaser	Address	Trans. Co.	Gallons
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(The 120,063 gallons of motor fuel listed on this Schedule II were sold and delivered to the Atomic Energy Commission, an Agency of the United States, F.O.B. Salt Lake City, Utah pursuant to the terms of General Services Administration Contract No. GS-10S-14022. Utah Oil Refining Company denies liability for the Motor Fuel Tax on such motor fuel and neither the preparation nor execution of this Schedule II or the attached Form No. MF-1000 Idaho, nor any provision thereof shall be deemed an admission of liability for the tax. By separate notice of paying Motor Fuel Tax under protest dated November 22nd, 1960, Utah Oil Refining Company protests payment of the total tax in the sum of \$7,059.72.)

3	T 46628	Atomic Energy Commission	Salt Lake City	C&T	8,569
4	T 46609	Atomic Energy Commission	Salt Lake City	C&T	8,577
7	T 46629	Atomic Energy Commission	Salt Lake City	C&T	8,582
11	T 88106	Atomic Energy Commission	Salt Lake City	P.I.E.	8,415
11	T 44572	Atomic Energy Commission	Salt Lake City	C&T	8,672
12	T 46610	Atomic Energy Commission	Salt Lake City	C&T	8,361
12	T 46630	Atomic Energy Commission	Salt Lake City	C&T	8,640
16	T 46631	Atomic Energy Commission	Salt Lake City	C&T	8,639
18	T 47902	Atomic Energy Commission	Salt Lake City	C&T	8,514



[fol. 186]

19	T 88551	Atomic Energy Commission	Salt Lake City	C&T	8,549
23	T 88552	Atomic Energy Commission	Salt Lake City	C&T	8,620
26	T 88553	Atomic Energy Commission	Salt Lake City	C&T	8,637
27	T 46611	Atomic Energy Commission	Salt Lake City	C&T	8,640
29	T 88554	Atomic Energy Commission	Salt Lake City	C&T	8,648

Total importations into the State of Idaho carried to Line  
2 of MF-1000 120,063

[fol. 187]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

REQUEST FOR ADMISSION UNDER RULE 36—  
Filed February 6, 1961

Plaintiff hereby requests Defendant within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

A.

That each of the following statements is true:

1. That at all times material to this action the Plaintiff, Utah Oil Refining Company, was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to do business in the State of Idaho, having complied with all of the laws of the State of Idaho pertaining to foreign corporations.

2. That at all times material to this action the Defendant, P. G. Neill, was and now is the duly appointed, qualified and acting Tax Collector of the State of Idaho, and a resident and citizen of Boise City, County of Ada, State of Idaho.

3. That at all times material to this action the Atomic Energy Commission was and is an agency of the Government of the United States of America, having been created and established by an Act of the Congress of the United States of America (Title 42 USCA, Section 2011, et seq.) and has been operating within the State of Idaho plants and facilities serving the government purposes of the United States.

4. That the General Services Administration is an agency of the Government of the United States of America authorized by Section 201(a)(3) of the Federal Property and Administrative Services Act of 1949 (Title 40 USCA, [fol. 188] Section 481(a)(3)), as amended, to procure items of personal property for government agencies, including the Atomic Energy Commission.

5. That the taxes for which the Plaintiff seeks refund and which are involved in this action were paid by Plaintiff on motor fuel sold pursuant to Contract No. GS-10S-14022 between the General Services Administration and Plaintiff.

6. That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to contract and imported into the State of Idaho by the Atomic Energy Commission. That after demand from the Defendant that it pay such taxes, Plaintiff, acting under duress and subject to its written protest, and in accordance with and as required by law, has filed with the office of Tax Collector of the State of Idaho, Motor Fuels Division, motor fuel tax reports covering the motor fuel sold by Plaintiff to the Atomic Energy Commission during each and every calendar month beginning with the month of November 1959, and through and including the month of October, 1960.

6. That Plaintiff has paid to the Defendant the following sums for and on account of taxes for gasoline sold and delivered to the Atomic Energy Commission on the dates indicated, to-wit:

Months	Delivered	Net Taxable Gallons	Tax paid under Formal Protest	Paid—1960 Date Tax
November	1959	96,258	\$ 5,775.48	January 6th
December	1959	138,156	8,289.36	January 21st
[fol. 189]				
January	1960	139,158	8,349.48	February 24th
February	1960	123,388	7,403.28	March 24th
March	1960	137,957	8,277.42	April 22nd
April	1960	109,026	6,541.56	May 23rd
May	1960	119,532	7,171.92	June 21st
June	1960	119,065	7,143.90	July 20th
July	1960	102,619	6,157.14	August 22nd
August	1960	125,949	7,556.94	September 21st
September	1960	107,585	6,455.10	October 24th
October	1960	177,662	7,059.72	November 22nd
TOTALS	.....	1,436,355	\$86,181.30	

7. That each and all of such payments were made involuntarily, under duress, and in fear of penalties, pains and forfeitures which Plaintiff might have incurred under the provisions of Title 49, Chapter 12 of the Idaho Code, as amended, had it refused to make such payments; that with each payment Plaintiff submitted to the Defendant a written notice of protest stating that the taxes exacted were illegal for a number of reasons, including the following:

1. The gasoline is sold and delivered to the Atomic Energy Commission f.o.b. Salt Lake City, Utah.
2. The State of Idaho has no authority to assess the tax against the Utah Oil Refining Company based upon an activity which takes place outside the borders of Idaho.
3. The gasoline is the property of the United States as and when it enters Idaho.

[fol. 190]

4. The gasoline is the property of the United States during the entire period of its existence within Idaho.

8. That in connection with each such payment of tax Plaintiff has made application for refund of the taxes paid by it under protest; that each such application for refund has been denied, refused and rejected by the Defendant.

B.

That each of the following documents exhibited with this request is a true and correct copy of the original document:

1. Motor Fuel Tax Report for the month of November, 1959, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

2. Motor Fuel Tax Report for the month of December, 1959, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

3. Motor Fuel Tax Report for the month of January, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

4. Motor Fuel Tax Report for the month of February, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

5. Motor Fuel Tax Report for the month of March, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

[fol. 191] 6. Motor Fuel Tax Report for the month of April, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.

7. Motor Fuel Tax Report for the month of May, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motors Fuels Division, together with notice of payment of tax under protest.
8. Motor Fuel Tax Report for the month of June, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.
9. Motor Fuel Tax Report for the month of July, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.
10. Motor Fuel Tax Report for the month of August, 1960, filed by Plaintiff with the office of Tax Collector of the State of Idaho, Motor Fuels Division, together with notice of payment of tax under protest.
11. Motor Fuel Tax Report for the month of September, 1960, filed by Plaintiff in the office of Tax Collector of the State of Idaho, Motor Fuel Division, together with notice of payment of tax under protest.
12. Motor Fuel Tax Report for the month of October, 1960, filed by Plaintiff in the office of Tax Collector of the State of Idaho, Motor Fuel Division, together with notice of payment of tax under protest.
13. Plaintiff's Application for Refund filed with the office of the Tax Collector of the State of Idaho, for the [fol. 192] months of November, 1959, December, 1959 and January 1960.
14. Order of Tax Collector of the State of Idaho dated the 14th day of March 1960, denying Plaintiff's application for refund for the months of November 1959, December 1959, and January 1960.
15. Plaintiff's Supplemental Application for Refund filed with the office of the Tax Collector of the State of Idaho for the months of February and March, 1960.
16. Order of Tax Collector of the State of Idaho dated the 15th day of July, 1960, denying Plaintiff's supplemental



application for refund for the months of February and March, 1960.

17. Plaintiff's Second Supplemental Application for Refund filed with the office of the Tax Collector of the State of Idaho for the months of April and May, 1960.

18. Order of Tax Collector of the State of Idaho dated the 15th day of July, 1960, denying Plaintiff's second supplemental application for refund for the months of April and May, 1960.

19. Plaintiff's Third Supplemental Application for Refund filed with the office of the Tax Collector of the State of Idaho for the months of June and July 1960.

20. Order of Tax Collector of the State of Idaho dated the 6th day of September 1960, denying Plaintiff's Third supplemental application for refund for the months of June and July 1960.

[fol. 193] 21. Plaintiff's Fourth Supplemental Application for Refund filed with the office of the Tax Collector of the State of Idaho for the months of August and September 1960.

22. Order of Tax Collector of the State of Idaho dated the 4th day of November, 1960, denying Plaintiff's Fourth supplemental application for refund for the months of August and September 1960.

23. Plaintiff's Fifth Supplemental Application for Refund filed with the office of the Tax Collector of the State of Idaho for the month of October, 1960.

24. Order of Tax Collector of the State of Idaho dated the 1st day of December, 1960, denying Plaintiff's Fifth supplemental application for refund for the month of October, 1960.

Dated this 31st day of January, 1961.

Calvin Dworshak, 326 Bank of Idaho Building, Boise,  
Idaho, Attorney for Plaintiff.

Certificate of service (omitted in printing).

[fol. 195]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

DEFENDANT'S ADMISSIONS, DENIALS AND OBJECTIONS TO PLAINTIFF'S REQUEST FOR ADMISSION—Filed February 16, 1961

\*\*\*\*\*

Comes Now the defendant and admits, denies and objects as follows to the plaintiff's Request for Admission dated January 31, 1961, and served upon defendant in the above-entitled action on February 6, 1961:

Request A1.

Defendant admits the facts stated therein.

Request A2.

Defendant admits the following portions of Paragraph

A2:

"That at all times material to this action the defendant, P. G. Neill, was and now is the duly appointed, qualified and acting Tax Collector of the State of Idaho, and a resident \* \* \* of \* \* \* County of Ada, State of Idaho."

Defendant denies that at the times material to this action or at the present time that the defendant was or is a resident or citizen of Boise City, Idaho.

Request A3.

Defendant's admits the following portions of Paragraph A3:

"That at all times material to this action the Atomic Energy Commission was and is an agency of the Government of the United States of America, having been created and established by an Act of the Congress of [fol. 196] the United States of America, having been created and established by an Act of the Congress of the United States of America (Title 42 USCA, Section 2011, et seq.) \* \* \*"

Defendant admits that the Atomic Energy Commission has been operating within the State of Idaho plants and facilities serving the governmental purposes of the United States, but defendant does not admit that the entire operation of the Atomic Energy Commission in the State of Idaho is serving a governmental purpose, but states that some aspects of said operation constitute a proprietary purpose.

Request A4.

Defendant admits the facts stated therein.

Request A5.

Defendant objects to this request upon the grounds and for the reasons that defendant has no personal knowledge regarding said transaction, said knowledge being peculiar to the plaintiff and the United States Government, the parties to said contract; that defendant has no reasonable means of ascertaining the facts contained in said request.

Request A6 on page 2.

Defendant admits the following portions of Paragraph A6 on page 2: (See page 188 this transcript, from line 7 through line 23 of said page 188.)

"That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code, as amended, by an Act of the Legislature of the State of Idaho approved on the 7th day of March 1959 (Idaho Sessions Laws, 1959, Chapter [fol. 197] 75, p. 168, et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered \* \* \* and imported into the State of Idaho \* \* \*."

Defendant admits that plaintiff has filed with the Office of Tax Collector of the State of Idaho, Motor Fuels Division, Motor Fuel Tax Reports covering the motor fuel sold by plaintiff which was imported into the State of Idaho during each and every calendar month beginning with the month of November, 1959, and through and including the month

of October, 1960. Defendant objects to the balance of said request for admission upon the grounds and for the reasons that the information requested is not within the knowledge of the defendant, but that said facts are exclusively within the knowledge of the plaintiff, and that defendant has no reasonable method of ascertaining the truth of said facts; further, that some of the matters requested are not facts but constitute conclusions of law.

Request A6 on page 3. (See page 188 this transcript from line 24 through line 12 on page 189.)

Defendant admits the following portions of Paragraph A6 on page 3:

"That Plaintiff has paid to the defendant the following sums for and on account of taxes for gasoline sold and delivered \* \* \* on the dates indicated, to-wit:

[fol. 198]

Months	Delivered	Net Taxable Gallons	Tax paid under Formal Protest	Date Tax Paid—1960
November	1959	96,285	5,775.48	January 6th
December	1959	138,156	8,289.36	January 21st
January	1960	139,158	8,349.48	February 24th
February	1960	123,388	7,403.28	March 24th
March	1960	137,957	8,277.42	April 22nd
April	1960	109,026	6,541.56	May 23rd
May	1960	119,532	7,171.92	June 21st
June	1960	119,065	7,143.90	July 20th
July	1960	102,619	6,157.14	August 22nd
August	1960	125,949	7,556.94	September 21st
September	1960	107,585	6,455.10	October 24th
October	1960	177,662	7,059.72	November 22nd
<b>TOTALS</b>		<b>1,436,355</b>	<b>\$86,181.30"</b>	

Defendant objects to the omitted portions of said request for the reason that the information requested is not within the knowledge of the defendant but exclusively within the knowledge of the plaintiff, and defendant has no reasonable means of ascertaining the truth of said information.

Request A7,  
Admitted.

Request A8.  
Admitted.

Request B1.  
Admitted.

Request B2.  
Admitted.

Request B3.  
Admitted.

[fol. 199] Request B4.  
Admitted.

Request B5.

Defendant denies that the motor fuel tax report for the month of March, 1960, and dated April 22, 1960, is a true and correct copy of the original in that the copy served upon defendant is notarized by an individual different than the original document which is in defendant's possession; in all other respects said document is a true and correct copy.

Request B6.

Defendant denies that the motor fuel tax report for the month of April, 1960, and dated May 23, 1960, is a true and correct copy of the original in that the copy served upon defendant is notarized by an individual different than the original document which is in defendant's possession; in all other respects said document is a true and correct copy.



**Request B7.**

Defendant denies that the motor fuel tax report for the month of May, 1960, and dated June 22, 1960, is a true and correct copy of the original in that the copy served upon defendant is notarized by an individual different than the original document which is in defendant's possession; in all other respects said document is a true and correct copy.

**Request B8.**

Defendant denies that the motor fuel tax report for the month of June, 1960, and dated July 20, 1960, is a true and correct copy of the original in that the copy served upon defendant is notarized by an individual different than the original document which is in defendant's possession; in all other respects said document is a true and correct copy.

**[fol. 200] Request B9.**

Defendant denies that the motor fuel tax report for the month of July, 1960, and dated August 22, 1960, is a true and correct copy of the original in that the copy served upon defendant is notarized by an individual different than the original document which is in defendant's possession; in all other respects said document is a true and correct copy.

**Request B10.**

Admitted.

**Request B11.**

Defendant objects to this request on the grounds that a copy of said motor fuel tax report and notice of payment of tax under protest were not served with said request.

**Request B12.**

Defendant objects to this request on the grounds that a copy of said motor fuel tax report and notice of payment of tax under protest were not served with said request.

**Request B13.**

Admitted.

Request B14.

Admitted.

Request B15.

Admitted.

Request B16.

Admitted.

Request B17.

Admitted.

Request B18.

Admitted.

[fol. 201] Request B19.

Admitted.

Request B20.

Admitted.

Request B21.

Admitted.

Request B22.

Admitted.

Request B23.

Admitted.

Request B24.

Admitted.

Dated this 15th day of February, 1961.

Frank L. Benson, Attorney General of Idaho, By  
Robert E. Bakes, Assistant Attorney General,  
Attorneys for Defendant, Residing at Boise, Idaho.

[fol. 202] *Duly sworn to by R. P. Peterson, jurat omitted in printing.*

Acknowledgment of Service (omitted in printing).

[fol. 216].

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF K. W. GRUNDMEYER—Filed February 17, 1961

\*\*\*\*\*

State of Idaho,  
County of Bonneville, ss.

K. W. Grundmeyer, Being first duly sworn, upon his oath, deposes and states:

I.

That he is the duly appointed, qualified and acting Chief of the Supply Management Branch of the Contracts and Administration Division of the Idaho Operations Office of the Atomic Energy Commission; that he has personal knowledge of the facts herein set forth; that said facts are true and that he is competent to testify as to the matters so set forth herein.

II.

That this affidavit is submitted in support of Plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

III.

That at all times material to this action the Atomic Energy Commission was and is an agency of the Government of the United States of America, having been created and established by an Act of the Congress of the United States of America (Title 42 USCA, Section 2011, et seq.), and has been operating within the State of Idaho plants and facilities serving the governmental purposes of the

United States. That in furtherance of its governmental purposes the Atomic Energy Commission has required [fol. 217] quantities of gasoline for use as motor fuel.

#### IV.

That the General Services Administration is an agency of the Government of the United States of America authorized by Section 210 (a)(3) of the Federal Property and Administrative Services Act of 1949 (Title 40 USCA, Section 481(a)(3)), as amended, to procure items of personal property for Government agencies, including the Atomic Energy Commission.

#### V.

That pursuant to a request in March of 1959 from the Federal Supply Service, General Services Administration, Seattle Regional Office, the Idaho Operations Office of the AEC submitted estimates of its gasoline requirements for the year commencing November 1, 1959 and ending October 31, 1960 to the Federal Supply Service.

#### VI.

That on the 26th day of June 1959, the Regional Director of the Federal Supply Service, GSA, Seattle Regional Office (Region 10) issued from his office in Seattle Invitation for Bids No. SES-1545 for furnishing gasoline to certain governmental facilities located in the States of Idaho, Montana, Oregon and Washington during the period from November 1, 1959 through October 31, 1960.

#### VII.

That the estimated requirements of the Idaho Operations Office of the AEC were included in that Invitation as Items 63 and 64.

#### VIII.

That Item No. 63 of said Invitation for Bids covered the furnishing of approximately 200,000 gallons of motor fuel [fol. 218] (gasoline) to the AEC and Item 64 covered the

furnishing of 1,000,000 gallons of motor fuel (gasoline) to the AEC.

### IX.

That Plaintiff was the successful bidder on Items 63 and 64 and entered into a written contract, identified as General Services Administration Contract No. GS-10S-14022, for supplying gasoline to the AEC f.o.b. bulk plant, Salt Lake City, Utah.

### X.

That the said contract provided, in part, that an "ordering activity" will:

" . . . place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which are to be made at Government expense." (Paragraph 10, Special Provisions).

### XI.

That the Atomic Energy Commission was at all times material to this action and during the term of the aforesaid contract the "ordering activity" as to Items 63 and 64 thereof.

### XII.

That during the term of said contract the Atomic Energy Commission placed orders under Items 63 and 64 for 1,436,355 gallons of gasoline.

### XIII.

That pursuant to said contract Plaintiff, Utah Oil Refining Company, a corporation, subsequent to the 31st day of October 1959, and up to and including the 31st day of October 1960, sold and delivered to the Atomic Energy Commission and the Atomic Energy Commission paid the [fol. 219] Plaintiff for the following quantities of gasoline:



Months Delivered	Net Gallons Taxed
November 1959	96,258
December 1959	138,156
January 1960	139,158
February 1960	123,388
March 1960	137,957
April 1960	109,026
May 1960	119,532
June 1960	119,065
July 1960	102,619
August 1960	125,949
September 1960	107,585
October 1960	117,662
Total	1,436,355

## XIV.

That upon the arrival of each such shipment of gasoline Plaintiff to the Atomic Energy Commission was f.o.b. common carriers at Salt Lake City in the State of Utah; that the Atomic Energy Commission selected all such common carriers, issued Government Bills of Lading to cover shipment of all said gasoline from Salt Lake City, Utah into the State of Idaho, and paid the common carriers all charges for such transportation.

## XV.

That upon the arrival of each such shipment of gasoline at the plant and facilities of the Atomic Energy Commission in Idaho the gasoline was placed in storage tanks owned by the Atomic Energy Commission.

[fol. 220]

## XVI.

That at all times material to this action the Atomic Energy Commission has not been the holder of an uncanceled Idaho dealer permit pursuant to the terms and provisions of Title 49, Chapter 12 of the Idaho Code, as amended.

Further your Affiant saith not.

K. W. Grundmeyer, Chief, Supply Management Branch, Contracts and Administration Division, Idaho Operations Office, United States Atomic Energy Commission.

Subscribed and Sworn to before me this 4th day of February, 1961.

(Seal)

Charles R. Griffin, Notary Public for Idaho, Residence: Idaho Falls, Idaho, My Commission expires: July 10, 1961.

[fol. 221]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO.

AFFIDAVIT OF W. L. OLSEN—Filed February 17, 1961

\*\*\*\*\*

State of Utah,  
County of Salt Lake, ss.

W. L. Olsen, Being first duly sworn, upon his oath, deposes and states as follows:

I.

That he is the duly appointed, qualified and acting Assistant Comptroller of the Plaintiff, Utah Oil Refining Company, a corporation; that he has personal knowledge of the facts herein set forth; that said facts are true and that he is competent to testify as to the matters so set forth herein.

II.

That this affidavit is submitted in support of Plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

## III.

That the Plaintiff, Utah Oil Refining Company, was at all times material to this action a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to do business in the State of Idaho, having complied with all of the laws of the State of Idaho pertaining to foreign corporations.

## IV.

That on the 26th day of June 1959, the Regional Director of the Federal Supply Service, GSA, Seattle Regional Office (Region 10) issued an Invitation for Bids identified [fol. 222] as No. SES-1545, to cover the furnishing of gasoline to certain government facilities located in the States of Idaho, Montana, Oregon and Washington; the supply period to run from the 1st day of November 1959, through the 31st day of October 1960. That Item No. 63 of said Invitation for Bids covered the furnishing of approximately 200,000 gallons of motor fuel (gasoline) to the AEC. That Item No. 64 of said Invitation for Bids covered the furnishing of approximately 1,000,000 gallons of motor fuel (gasoline) to the AEC.

## V.

That, acting pursuant to the aforesaid Invitation for Bids, the Utah Oil Refining Company, a corporation, submitted its formal bid from its principal offices at Salt Lake City, Utah, to the Regional Director of the Federal Supply Service of GSA (Region 10) as to Items 63 and 64 of the invitation and, thereafter, in accordance with law on the 28th day of October, 1959, GSA formally awarded the contract as to Items 63 and 64 to the Utah Oil Refining Company, a corporation, at Seattle, Washington.

## VI.

That the aforesaid Invitation, Bid and Award have been designated as Contract No. GS-10S-14022, a true and correct copy of which has been annexed to the affidavit of Harold R. Belles to be filed herein.

## VII.

That Item 63 of the contract as awarded provided for the sale by Utah Oil Refining Company to the Atomic Energy Commission of approximately 200,000 gallons of gasoline, the contract as awarded specified that such gasoline was to be sold 'f.o.b. bulk plant' with the bulk plant [fol. 223] being specifically located by the contract at Salt Lake City, Utah.

## VIII.

That Item 64 of the contract as awarded provided for the sale by Utah Oil Refining Company to the Atomic Energy Commission of approximately 1,000,000 gallons of gasoline, the contract as awarded specified that such gasoline was to be sold 'f.o.b. bulk plant' with the bulk plant being specifically located by the contract at Salt Lake City, Utah.

## IX.

That the said contract provided, in part, that an 'ordering activity' (which was the AEC as to Items 63 and 64) will:

" \* \* \* place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which are to be made at Government expense." (Paragraph 10, Special Provisions).

## X.

That the said contract has remained in full force and effect during the entire term thereof.

## XI.

That pursuant to said contract Plaintiff, Utah Oil Refining Company, subsequent to the 31st day of October, 1959, and up to and including the 31st day of October 1960, sold and delivered to the Atomic Energy Commission certain quantities of gasoline; that said gasoline was sold and delivered to the Atomic Energy Commission f.o.b. com-

mon carriers at Salt Lake City in the State of Utah; that by common carriers selected by the Atomic Energy Commission the gasoline was transported into the State of Idaho. Plaintiff did not ever select the common carriers [fol. 224] which transported said gasoline into the State of Idaho, nor did it ever pay any common carrier for such transportation; that at all times relevant to this case the Plaintiff has been an Idaho licensed dealer in motor fuels.

## XII.

That the Defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March 1959 (Idaho Session Laws, 1959, Chapter 75, page 168, et seq.) the Plaintiff is liable for the payment of a motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline so sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, by the Plaintiff pursuant to the afore-mentioned contract; that after demand from the Defendant that it pay such taxes, the Plaintiff, acting under duress and subject to its written protest, paid to the Defendant the following sums for and on account of taxes demanded for gasoline sold and delivered to the Atomic Energy Commission at Salt Lake City, Utah, pursuant to the afore-mentioned contract and by such Atomic Energy Commission transported into the State of Idaho during the months indicated:

Months Delivered	Net Taxable Gallons	Tax paid under Formal Protest
November 1959	96,258	\$ 5,775.48
December 1959	138,156	8,289.36
January 1960	139,158	8,349.48
February 1960	123,388	7,403.28
March 1960	137,957	8,277.42
April 1960	109,026	6,541.56
May 1960	119,532	7,171.92



[fol. 225]

June	1960	119,065	7,143.90
July	1960	102,619	6,157.14
August	1960	125,949	7,556.94
September	1960	107,585	6,455.10
October	1960	117,662	7,059.72
Totals		1,436,355	\$86,181.30

## XIII.

That each and all of such payments were made involuntarily, under duress, and in fear of penalties, pains and forfeitures which Plaintiff might have incurred under the provisions of Title 49, Chapter 12 of the Idaho Code, as amended, had it refused to make such payments; that with each payment Plaintiff submitted to the Defendant a written notice of protest stating that the taxes exacted were illegal for a number of reasons, including the following:

- “1. The gasoline is sold and delivered to the Atomic Energy Commission f.o.b. Salt Lake City, Utah.
2. The State of Idaho has no authority to assess the tax against the Utah Oil Refining Company, based upon an activity which takes place outside the borders of Idaho.
3. The gasoline is the property of the United States as and when it enters Idaho.
4. The gasoline is the property of the United States during the entire period of its existence within Idaho.”

[fol. 226]

## XIV.

That pursuant to the terms and provisions of Chapter 12 of Title 49 of the Idaho Code, as amended, Plaintiff has heretofore made applications for refunds of the taxes paid by it under protest; that such applications for refunds have been denied, refused and rejected by the Defendant in each instance.

Further your Affiant saith not.

W. L. Olsen.

Subscribed and Sworn to before me this 31st day of January, 1961.

(Seal)

Wayne C. Durham, Notary Public for Utah, Residence: Salt Lake City, Utah, My Commission expires: 7-31-61.

[fol. 227]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF HAROLD R. BELLES—Filed February 17, 1961

\*\*\*\*\*

State of Washington,  
County of King, ss.

Harold R. Belles, Being first duly sworn, upon his oath, deposes and states:

I.

That he is a duly appointed, qualified and acting Contracting Officer of the General Services Administration, Federal Supply Service, Region 10, and is the Contracting Officer on the contract referred to in paragraph VII hereof; that he has personal knowledge of the facts herein set forth; that said facts are true and that he is competent to testify as to the matters set forth herein.

II.

That this affidavit is submitted in support of the Plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

III.

That the General Services Administration (hereinafter referred to as GSA) is an agency of the government of the United States of America authorized by Section 201 (a)(3) of the Federal Property and Administrative Ser-

VICES Act of 1949 (Title 40 USCA, Section 481 (a)(3)), as amended, to procure items of personal property for government agencies, including the Atomic Energy Commission (hereinafter referred to as AEC).

[fol. 228]

#### IV.

That by regulations and orders duly and legally adopted the Administrator of General Services has established the Federal Supply Service, General Services Administration, Region 10, under the direction of the GSA Regional Commissioner, Region 10, and that by successive delegations of authority the Regional Director, Federal Supply Service, GSA, Region 10, is authorized to perform the responsibilities of the Administrator of General Services under the above cited Section 201(a)(3) of the Federal Property and Administrative Services Act of 1949 within the states of Idaho, Washington, Oregon, Montana and Alaska.

#### V.

That on the 26th day of June 1959, the Regional Director of the Federal Supply Service, GSA, Seattle Regional Office (Region 10) issued an Invitation for Bids identified as No. SES-1545, to cover the furnishing of gasoline to certain governmental facilities located in the States of Idaho, Montana, Oregon and Washington; the supply period to run from the 1st day of November 1959 through the 31st day of October 1960. That Item No. 63 of said Invitation for Bids covered the furnishing of approximately 200,000 gallons of motor fuel (gasoline) to the AEC. That Item No. 64 of said Invitation for Bids covered the furnishing of approximately 1,000,000 gallons of motor fuel (gasoline) to the AEC.

#### VI.

That, acting pursuant to the aforesaid Invitation for Bids, the Utah Oil Refining Company, a corporation, submitted its formal bid from its principal offices at Salt Lake City, Utah, to the Regional Director of the Federal Supply Service of GSA (Region 10) as to Items 63 and 64 of the

[fol. 229] invitation and, thereafter, in accordance with law, on the 28th day of October 1959, GSA formally awarded the contract as to Items 63 and 64 to the Utah Oil Refining Company, a corporation, at Seattle, Washington.

## VII.

That there is annexed hereto and made a part hereof, and by this reference incorporated herein, a true and correct copy of the above referred to Invitation, Bid and Award designated as Contract No. GS-10S-14022, duly certified by the custodian of the office records of GSA.

## VIII.

That Item 63 of the contract as awarded provided for the sale by Utah Oil Refining Company to the Atomic Energy Commission of approximately 200,000 gallons of gasoline; the contract as awarded specified that such gasoline was to be sold 'f.o.b. bulk plant' with the bulk plant being specifically located by the contract at Salt Lake City, Utah.

## IX.

That Item 64 of the contract as awarded provided for the sale by Utah Oil Refining Company to the Atomic Energy Commission of approximately 1,000,000 gallons of gasoline; the contract as awarded specified that such gasoline was to be sold 'f.o.b. bulk plant' with the bulk plant specifically located by the contract at Salt Lake City, Utah.

## X.

That the said contract provided, in part, that an 'ordering activity' (including the AEC) will:

"\* \* \* place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which [fol. 230] are to be made at Government expense." (Paragraph 10, Special Provisions).

That the AEC was at all times during the term of the contract the 'ordering activity' or 'ordering agency' under said contract as to Items 63 and 64 thereof; that said contract has remained in full force and effect during the term thereof.

Further your Affiant saith not.

H. R. Belles.

Subscribed and Sworn to before me this 13th day of February, 1961.

(Seal)

Robert Douglas Green, Notary Public for Washington, Residence: Auburn, Washington, My Commission expires: Oct. 4, 1962.

[fol. 231]

ATTACHMENT TO AFFIDAVIT OF HAROLD R. BELLES

CONTRACT No. GS-10S-14022

UNITED STATES OF AMERICA

GENERAL SERVICES ADMINISTRATION

Seattle Washington. December 6, 1960

I HEREBY CERTIFY that the attached Contract No. GS-10S-14022 together with each of the Terms and Conditions, General Provisions and Special Provisions which are incorporated in said contract by reference, together with supplemental teletypes dated October 26, October 28 and November 3 which served to confirm an understanding as to award are true and correct copies of the originals thereof in my custody as a part of the official records of General Services Administration.

IN TESTIMONY WHEREOF I, Franklin Floete Administrator of General Services, have herunto caused the seal of the General Service Administration to be affixed and my name to be subscribed by the Regional Counsel—Region 10



of the said Administration, at the City of Seattle this 6th day of December 1960

(SEAL)

Franklin Floete  
Administrator of General Services

By C. M. Graff  
Regional Counsel—Region 10  
Title

[fol. 232]

O

PBS TELETYPE

WUM-140 PD AR

1959 Nov 3 PM 2 52

JUM SALT LAKE CITY UTAH NOV 3 1959 249PMM  
R BELLES

CONTRACTING OFFICER GENL SERVICE ADMN  
RETEL GASOLINE FURNISHED ON CONTRACT  
GS-10S-14022 WILL MEET SPECIFICATION VV-C-76.  
PRESUME YOU ARE NOTIFYING ALL CONCERNED  
OF ONE CENT INCREASE IN PRICE FOR FEDERAL  
TAX INCREASE. ADVISE

KK CRANDALL UTAH OIL REFINING CO.

240p

GS-10S-14022 VV-G-76

[fol. 233]

GSA FEDERAL SUPPLY SERVICE 10FBN 3  
118.c.31649.043

OCTOBER 28, 1959

UTAH OIL REFINING COMPANY  
10 WEST BROADWAY  
SALT LAKE CITY, UTAH

ATTENTION: MR. CRANDALL

CONFIRMING TELCON. 10/28 ITEMS 63A AND 64A  
INVITATION SES-1545 AWARDED YOU UNDER CON-  
TRACT GS-10S-14022. GSOLINE FURNISHED MUST

FULLY COMPLY WITH SPECIFICATION VV-G-76.  
PLEASE CONFIRM.  
HAROLD R. BELLES

CONTRACTING OFFICER  
GENERAL SERVICES ADMINISTRATION  
MtBeiningen/rk

[fol. 234]

PBS TELETYPE

1959 Oct 26 PM 3 48

RECD WY WUM 138

TV

WU M142 Pd

JUM SALT LAKE CITY UTAH OCT 26 1959 419PMM  
GENERAL SERVICES ADMN

FEDERAL SUPPLY SVC

RETEL CON OUR INVITATIONAL BID ON NUMBER  
SES 1545 WILL SILL APPLY ON ITEMS 63 AND 64  
FOR ONE YEAR BEGINNING NOVEMBER 1 1959.  
WILL APPRECIATE YOUR AWARD UTAH OIL RE-  
FINING CO KK CRANDALL

345P.

SES 1545 63 64 1 1959.

[fol. 235]

# FEDERAL SUPPLY SCHEDULE INVITATION, BID, AND AWARD

Contract No. GS-10S-14022

## Purpose

Establishment of appropriate contracts under which Government agencies may order articles and services listed herein as may be needed from time to time throughout the period stated below.

## Coverage

Use of the contracts established as a result of this invitation will be mandatory upon certain Government agencies, and available for use on an optional basis by other agencies, all as provided herein. (The resulting Federal Supply Schedule receives wide distribution.)

**INVITATION FOR BIDS****Invitation No. SES-1545****Issued June 26, 1959****Opening 1:30 P.m., P.S.T., July 21, 1959**

**Sealed bids in duplicate, subject to the terms, conditions, provisions and schedule attached hereto or incorporated herein by reference, as more fully specified on the reverse hereof, will be received at the issuing office specified below until the opening time and date stated above, and then publicly opened, for supplying**

**GASOLINE, GSA—REGION 10****States of Idaho, Montana, Oregon and Washington****(FSC Group 91)**

**to the United States Government for the period November 1, 1959 through October 31, 1960**

**[fol. 236]**

**Bidder's name UTAH OIL REFINING COMPANY  
10 WEST BROADWAY**

**Bidder's address SALT LAKE CITY, UTAH  
Submit bid in duplicate, address envelope:**

**GENERAL SERVICES ADMINISTRATION  
Federal Supply Service, Region 10  
909 First Avenue, Seattle 4, Washington**

**Attn:**

**Bid Opening Room  
FSC Group 91**

**Issued by:**

**General Services Administration—Federal Supply Service  
Region 10  
909 First Avenue, Seattle 4, Washington**

---

**BID (Submit in duplicate)**

**To General Services Administration  
Federal Supply Service  
At the address shown on the  
reverse hereof**

**Date**

**July 17, 1959**

In compliance with the invitation for bids, subject to the **SCHEDULE** and the **SPECIAL PROVISIONS** which are attached hereto, and subject to the **TERMS AND CONDITIONS OF THE INVITATION FOR BIDS** (Federal Supply Schedule Contract), GSA Form 281b, March 1951, and the **GENERAL PROVISIONS FOR FEDERAL SUPPLY SCHEDULE CONTRACTS** (March 1951), GSA Form 281c, both of which are incorporated herein by reference (copies of said Terms and Conditions of the Invitation for Bids and said General Provisions may be obtained from the above office), the undersigned offers and agrees to furnish, within the time specified, the articles and services at the prices stated opposite the respective items listed on said schedule provided this bid is accepted on or before the date beginning the contract period or such earlier date as may be specified herein by the bidder.

[fol. 237] Discount will be allowed for prompt payment as follows: 10 calendar days ..... percent; 20 calendar days ..... percent; 30 calendar days 1 percent; or as stated in the invitation or bid. Time will be computed as stated in Article 3 of Terms and Conditions of the Invitation for Bids (Federal Supply Schedule Contracts).

---

Bidder represents that the prices stated in this bid are neither directly nor indirectly the result of any agreement with any other bidder. Bidder also represents (Check appropriate boxes):

(1) That he ..... is, X is not, a small business concern. For this purpose, a small business concern is one which (a) is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or (b) is certified as a small business concern by the Small Business Administration. (See Code of Federal Regulations, Title 13, Chapter II, Part 103, 21 Fed. Reg. 9709, which contains the detailed definition and related procedures.)

In connection with supply contract, if bidder is a non-manufacturer, he also represents that the products to be furnished hereunder ..... will, X will not, be produced by a small business concern.

(2) That he is a ..... regular dealer in, X manufacturer of, the supplies bid upon.

(3) (a) That he ..... has, X has not, employed or retained a company or person (other than a full-time bona fide employee working solely for the bidder.... to solicit or secure this contract, and (b) that he ..... has, X has not, paid or agreed to pay to any company or person (other [fol. 238] than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the contracting officer. (Note: For interpretation of the representation, including the term "bona fide employee," see General Services Administration Regulations, Title 44, Secs. 150.7 and 150.5 (d) Fed. Reg. Dec. 31, 1952, Vol. 17, No. 253.)

Full Name of Bidder  
UTAH OIL REFINING  
COMPANY

Signature of person authorized to sign this Bid

A. J. Badger

Name and Title of person signing

A. J. Badger, President  
Telephone Number  
DA 8-8466

Business Address of Bidder,

Type of business (Check box)

..... Individual

..... Partnership

☒ X Corporation

Incorporated in the State of  
Delaware

Address to which orders should be forwarded

UTAH OIL REFINING  
COMPANY

10 WEST BROADWAY  
SALT LAKE CITY, UTAH

### AWARD

Accepted as to items.

4, 31, 43, 53, 76, 78, 81, 82  
and 486.

United States of America  
by H. R. Belles

Date

Sept. 15, 1959

Name and Title of Contracting Officer

H. R. Belles, Contracting  
Officer



Instructions to Bidders are contained in the **TERMS AND CONDITIONS of THE INVITATION FOR BIDS (FEDERAL SUPPLY SCHEDULE CONTRACTS)**, and the **GENERAL PROVISIONS FOR FEDERAL SUPPLY SCHEDULE CONTRACTS**.

[fol. 239]

November 1, 1959 through October 31, 1960

FSC Group 91—Gasoline  
Region 10

### MANDATORY USE

Use of this schedule for procuring supplies and/or services listed herein for delivery in the geographical area set forth below will be mandatory upon the activities of the Federal agencies hereinafter identified in the schedule:

#### STATES OF IDAHO, MONTANA, OREGON AND WASHINGTON SMALL REQUIREMENT PROVISION:

No ordering office will be obligated to order and no contractor will be obligated to make any delivery amounting to less than 200 gallons, but such deliveries may be ordered by the Government subject to acceptance by the contractor.

**GENERAL AND SPECIAL PROVISIONS, GENERAL PROVISIONS FOR FEDERAL SUPPLY SCHEDULE CONTRACTS, (March 1951), AND SPECIAL PROVISIONS FOR BULK AND DRUM DELIVERIES OF GASOLINE, FUEL OILS, AND SOLVENTS, March 1, 1951,** are incorporated herein by reference and made a part hereof. The bidder hereby acknowledges receipt of such forms. (Additional copies of these forms may be obtained upon request.) The following paragraphs of the General Provisions for Federal Supply Schedule Contracts are inapplicable and hence shall not become a part of this contract: No. 1 (Scope of Contract), No. 2 (Specifications), No. 3 (Samples) No. 4 (Packing), No. 5 (Minimum Order: Weight), No. 6 (Catalogues; price Lists) No. 10 (Variance in Quantity) No. 17 (Inspection), No. 12 (Assignment of Payments) should be disregarded and the following substituted therefor:

**ASSIGNMENT OF CLAIMS:** Article 12, GSA, Form 281c, General Provisions for Federal Supply Schedule contracts, is amended by inserting the words "as amended" immediately following "Act of 1940" in the first sentence, as well as after "Act" at the end of article 12, and by adding the following: Notwithstanding any other provision of this contract, payments to an assignee of any moneys due or to become due under any purchase order assigned as provided herein shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. (Additional copies of these General Provisions may be obtained upon request.)

The "Special Provisions for Bulk and Drum Deliveries of Gasoline, Fuel Oils, and Solvents March 1, 1951" is revised in first paragraph of Section 19 to read as follows:

"19. Quantity Determinations. Temperature-volume corrections, when required by the Contract or by the ordering activity, shall be made in accordance with Table 7 of the ASTM-IP Petroleum Measurement Tables. When temperature-volume corrections are required, the volume shall be corrected to 60 degrees Fahrenheit. The quantity of liquid fuel delivered to the ordering activity on each order shall be determined as follows:

Paragraph 21 of Special Provisions for Bulk and Drum Deliveries of Gasoline, Fuel Oil and Solvents dated March 1, 1951 is deleted.

**QUANTITY DETERMINATION:** The first sentence of article 19(a) of the Special Provisions for Bulk and Drum Deliveries of Gasoline, Fuel Oils, and Solvents, dated March 1, 1951, should be disregarded and the following substituted therefor: "Unless otherwise specified in the schedule, minimum deliveries by tank wagon shall be 200 gallons, and minimum deliveries in drums shall be 4 drums (full) of approximately 50 to 55 gallons each."

**LATE BIDS:** Paragraphs 10(c) of the Terms and Conditions of the Invitation for Bids is deleted and the following substituted:

[fol. 241] "No Bid or modification received after the time set for opening will be considered except (1) those received before award is made, but delayed in the mail by unusually severe weather conditions, fire flood, strikes, accident and similar abnormal occurrences beyond control of the bidder, if written certification is furnished by authorized postal authorities to that effect and (2) when no bid is received by the time set for opening, and a bid or a bid and a modification, arrive by mail after the time set for opening, but before award is made to another, late bidder qualifying under this exception; provided it is determined by the Government that such non-arrival on time was due solely to delay in the mails for which the bidder was not responsible."

**GRATUITIES:** (The Gratuities Clause is applicable to all orders from Military Departments. In subparagraphs (a) and (b) below, the term "contract" shall be deemed to refer to any order placed under this contract by a military department. Where the right of the contractor to proceed with an order is terminated in accordance with this Gratuities Clause by any military department ordering office, the Government may, in addition to the rights under this Gratuities Clause, by written notice to the contractor, terminate the whole or any part of this Federal Supply Schedule Contract in the same manner as provided in paragraph (a) (1) of the clause entitled "Default", in which case the Government shall be entitled to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract.)

(a) The Government may, by written notice to the contractor, terminate the right of the contractor to proceed under this contract if it is found, after notice and hearing, [fol. 242] by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the contractor, or any agent or representative of the contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment

with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such contract: Provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

#48 Utah, Oil

FSC GROUP 91—GASOLINE—Region 10

4

November 1, 1959 through October 31, 1960

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the contractor, as it could pursue in the event of a breach of the contract by the contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three or more than ten times the cost incurred by the contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

**NONDISCRIMINATION IN EMPLOYMENT:** Article 27 of GSA Form 281c, General Provisions for Federal Sup-[fol. 243] ply Schedule Contracts is revised to read as follows:

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment

or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause. The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

**ACCEPTANCE:** Bidders are required to allow a minimum of 72 days for consideration of their bids after the date bids are opened. The Government reserves the right to award on either a maximum-price or a posted-price basis.

**DISCOUNTS:** In evaluating bids, prompt payment discounts will be considered only on the basis of payment within 20 days. No discount offered for payment within less than 20 days will be considered in evaluating bids for award. Bids offering discounts for payments within period in excess of 20 days will be evaluated for purpose of award as though they are discounts offered for payment within 20 days.

**DISPUTES:** Article 22 (Disputes) of the general provisions for Federal Supply Schedule contracts is subject to the provisions of P.L. 356, 83rd Congress, approved May [fol. 244] 11, 1954, which permits judicial review of the decision of the head of any agency (or his representative or board) under the disputes clause where it is alleged that such decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

**PATENT INDEMNITY:** The contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any letters patent of the United States (except letters patent issued upon an application which



is now or may hereafter be for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished hereunder. The foregoing indemnity shall not apply unless the contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given an opportunity to present recommendations as to the defense thereof; and further, such indemnity shall not apply in any one of the following situations: (1) Any infringement resulting from the addition to any such supplies or other supplies not furnished by the contractor for the purpose of such additions; (2) Any settlement of a claim of infringement made without the consent of the contractor, unless required by final decree of a court of competent jurisdiction.

**PRICE REDUCTION:** Paragraph 13 of the General Provisions for Federal Supply Schedule Contracts (March 1951) GSA Form 281c, is inapplicable. Special Provisions Bulk and Drum Deliveries Gasoline, Fuel Oils and Solvents applies.

[fol. 245] **BUY AMERICAN ACT:** Paragraph 23 of GSA Form 281c is not applicable to this invitation and is superseded by the following:

Bids will be evaluated in accordance with the procedures set forth by Executive Order 10582 of December 17, 1954, which provides that the Government give preference to domestic source end products. In ascertaining the origin of petroleum products for purposes of a Buy American determination, when material of mixed foreign and domestic origin is offered, it shall be considered foreign if the foreign materials constitute 50% or more of the cost of all products used in the completed product. All products produced from 100% domestic petroleum. No foreign material used.

Bidder to State None % of the cost of all products used in the completed products offered herein are of foreign origin.

**TRANSPORTATION TAX:** Section 4271 of the Internal Revenue Code (26 U.S.C. 4271) which provided for the imposition of a tax on the transportation of property from one point in the United States to another amounting to 3% of the cost of transportation has been repealed by Public Law 85-475. All prices quoted should reflect the exclusion of such tax.

**NOTICE TO BIDDERS: RETURN ONLY THE PAGES APPLICABLE TO YOUR BID.** Failure to bid or to advise this office that future invitations are desired or that address is changed will ordinarily result in the removal of your name from our mailing list for the entire class of supplies covered by this invitation. The cover sheet of the invitation returned with appropriate notations will constitute a response.

November 1, 1959 through October 31, 1960 5 FSC GROUP  
91—GASOLINE—Region 10

**DELIVERIES:** All prices f.o.b. destination, either tank- [fol. 246] wagon or transport truck, shall mean delivered into the storage tanks of the activity. Minimum delivery by transport truck shall be full capacity of the vehicle, approximately 3,000 to 7,500 gallons unless otherwise specified.

Quotation f.o.b. bulk plant shall include loading either railroad tank cars or transport trucks, or both, as the Government reserves the right to name the type of transportation to be used.

Marine service-station deliveries: Unless otherwise indicated, the maximum price quoted for an item shall include delivery from bidder's marine service station at that location.

**MAILING ADDRESS:** Contractor's invoices shall show the address to which remittances are to be sent. If pur-

chase orders or communications from ordering activities relating to any item(s) of the schedule are to be mailed to an address other than the address shown on page one (1) of the Invitation for Bids, the bidder shall so indicate below or in an attachment;

**INSPECTION:** Paragraph 22 of the Special Provisions for Bulk and Drum Deliveries of Gasoline, Fuel Oils and Solvents, is superseded by the following provisions:

(a) Inspection shall be made by and in accordance with the procedures of the ordering activity, provided, however, the Government may inspect at origin or destination or may waive inspection.

(b) The Contractor shall furnish hereunder, from time to time, at the request of, in the manner and to the place designated by the inspector, a reasonable number of samples of the supplies described herein without charge to the Government. Such samples shall be packed and marked and shipped by contractor, shipping expense pre-[fol. 247] paid, in containers and shipping boxes furnished by the contractor.

(c) The contractor shall, when requested by the Government inspector, make available such information as is necessary to permit the inspector to be familiar with the methods and procedures employed by the contractor to insure the quality of the material furnished under the contract.

**POINTS OF INSPECTION ARE AS FOLLOWS:**

Inspector of Naval Material, 2300 Eleventh Avenue SW., Seattle 4, Washington—Telephone Main 2-1472, Ext., 33.

Commander, Ogden Air Material Area, Attention: OOG Hill Air Force Base, Utah—Telephone Ogden, Utah 5-2211.

Paragraph five (5) "Additional Agencies and additional gallonage" of the Special Provisions for Bulk and Drum Deliveries of Gasoline, Fuel Oil and Solvents is not applicable.

**CONTRACTOR'S DRUMS—FREE PERIOD, CHARGES, REFUNDS:** If the bidder desires to limit

the free period for the retention of contractor's drums, the following information shall be furnished:

Free period after receipt of drums by ordering activity none days.

Deposit required after free period expires \$6.00 at time of delivery per drum.

Period allowed for return after receipt of deposit 3 months.

Refund after return of drums \$6.00 per drum.

Contractor shall inform ordering office by means of a notice on their invoice or a tag affixed to drums, the date of delivery and date demurrage starts.

**CONTRACTOR'S TRANSPORT TRUCKS—FREE PERIOD: CHARGES:** If the bidder desires to limit the free period for the unloading of contractor's transport [fol. 248] trucks, the following information shall be furnished in hours or fractional part of an hour:

Free period for unloading transport trucks 2 hour(s).

Rate for retention after free period expires \$3.00 per hr.

**GRADES OF GASOLINE:** Federal Stock Numbers (FSN) have been assigned to the items covered by this schedule. The FSN identifies gasoline by grade and class in accordance with Federal Specification No. VV-G-76, Regular for Class A, Class B, and Class C. The following FSN is to be used as applicable:

#### *Class A*

FSN 9130-160-1816-Bulk Gasoline

FSN 9130-273-2382-55 gal. drum (16 ga.)

FSN 9130-160-1815-55 gal. drum (18 ga.)

#### *CLASS B*

FSN 9130-160-1827-Bulk Gasoline

FSN 9130-273-2383-55 gal. drum (16 ga.)

FSN 9130-160-1828-55 gal. drum (18 ga.)

**CLASS C**

FSN 9130-273-2381-Bulk Gasoline

FSN 9130-273-2384-55 gal. drum (16 ga.)

FSN 9130-160-1819-55 gal. drum (18 ga.)

FSC GROUP 9—

6 November 1, 1959\* through  
GASOLINE—Region 10 October 31, 1960

Unleaded White shall be in accordance with Federal Specification No. VV-G-109 dated 3 April 1950. The following FSN is to be used as applicable:

FSN 9130-160-1837-Bulk Gasoline

FSN 9130-221-0679-55 gallon drum (16 gage)

FSN 9130-240-8209-55 gallon drum (18 gage)

**TRADE OR BRAND NAME:** Bidder shall indicate below the trade or brand name it is proposed to furnish. This name will, during the contract period, be accepted as a representation of the characteristics and quality of the gasoline being offered.

GOVERNMENT  
GRADE

BIDDER'S GRADE OR  
BRAND NAME

R

UTOCO Regular

Unleaded White

UTOCO Stove &amp; Lighting

**SPECIFICATIONS:** Article 2(d) of GSA Form 281c, General Provisions for Federal Supply Schedule Contracts is deleted and the following substituted therefor:

The specifications applicable to each article is stated in the invitation for bids in connection with the General Description of the article. Single copies of referenced Federal, Interim Federal and GSA Specifications are available without charge at the General Services Administration, Business Service Centers in Boston, New York, Washington D.C., Atlanta, Chicago, Kansas City, Mo., Dallas, Denver, San Francisco, Los Angeles, Portland, Oregon and Seattle, Washington.

**TAX DATA:** (See paragraphs 19 and 20 of General Provisions). The bidder certifies that all F.O.B. activity quo-



tations are exclusive or inclusive of State Tax in the amount shown under *each State* in the space provided therefor, or for F.O.B. bulk plant quotations, on the Tax Data paragraph below:

**TAX DATA (For F.O.B. bulk plant items only) TAXES EXCLUDED FROM OR INCLUDED IN QUOTATION** (See paragraphs 19 and 20 of General Provisions). The bidder certifies that in all *f.o.b. bulk plant quotations* the following State taxes have been **EXCLUDED** from or **INCLUDED** in such quotations in the amount shown:

Item No.	Name of State	Amount and Nature of Tax	Included or Excluded
63-a	Utah	.06 State Tax	Excluded
64-a	Utah	.06 State Tax	Excluded
456-a,b	Washington	.065 State Tax	Included
536-a,b	Washington	.065 State Tax	Included

(In the event no indication is made by the bidder that State Taxes are excluded or included, it will be understood that all State Taxes are included in prices quoted.)

**FEDERAL TAX:** Prices quoted for all items shall include all applicable Federal Taxes in effect on date set for the opening OF BIDS.

#### **ABBREVIATIONS USED**

AEC	Atomic Energy Commission
AFB	Air Force Base
Ag.	Agriculture
An. Ind.	Animal Industry
ARA	Agriculture Research Admin.
ARS	Agricultural Research Station
BPA	Bonneville Power Admin.
BPR	Bureau of Public Roads
CAA	Civil Aeronautics Admin.
CG	Coast Guard
CGB	Coast Guard Base
Col. R. Dist.	Columbia River District
Comm.	Commerce
Cons. Res.	Conservation Research
Cp.	Camp
D/F	Direction Finder
Ent. & Plt. Quar.	Entomology & Plant Quarantine

E.S.	Experiment Station
FCC	Federal Communication Commission
FS	Forest Service
F & W.L.	Fish and Wildlife
G.D.	Government drums
GS	Guard Station
GSA	General Services Administration
Ind. Affa.	Indian Affairs
Ind. Agy.	Indian Agency
Irr. Cp.	Irrigation Camp
Int.	Interior
LH	Light House
Land. Mgmt.	Land Management
LS	Light Station and/or Lifeboat Station
N.P. or Nat. P.	National Park
N.F.	National Forest
N.M.	National Monument
NPS	National Park Service
NWR	National Wildlife Refuge
PBS	Public Building Service
PHS	Public Health Service
P.O.	Post Office
Pt.	Point
Pub. Rds.	Public Roads
Rd.	Road
Rd. Cp.	Road Camp
Recla.	Reclamation
R.S.	Ranger Station
Sta.	Station
T.C.	Tank car

[fol. 252]

T.T.

Transport Truck

T.W.

Tank Wagon

SCS

Soil Conservation Service

VA

Veterans Administration

Whse.

Warehouse

WR

Wildlife Refuge

November 1, 1959 through October 7

FSC GROUP 91 - Gasoline

31, 1960

Region 10

SCHEDULE

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date of bid	Amt. to be deducted from posted price	Maximum price per gallon
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IDAWO

State tax in the amount of \$.06 is included X excluded (bidder please indicate which is applicable. If no indication is made by the bidder, it will be understood that the State Tax is included in prices quoted.)

Regular Gasoline

1 American Falls, Bur

Reclam. Int....TW 500 . 14,000 .302 .0525 .2497.

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date of bid	Amt. to be deducted from posted price	Maximum price per gallon
2	Arco, 20 mi W of Craters of the Moon, N.M. NPS...TW	1000	2000	.309	.0407	.2683
3	Ashton, Targhee NF, Ag. FS.....TW	1000	3000	.312	.0504	.2616
4	Ashton, Comm. Pub. Rds....Drum	200	2000	.312	.0504	.2616
5	Ashton, 35 mi N of Bur. Reclam. ....TW	500	2000	.317	.0504	.2666
6	Ashton, 6 mi E of Porcupine RS. Ag. FS.....TW	500	2000	.317	.0504	.2666
7	Atlanta, 86 mi E of Boise, Ag. FS .....TW	1000	2000	.337	.0449	.3921
8	Avery, RS., Ag. FS.....TW	1000	6000			
9	Avery, 16 mi S of Roundtop RS. Ag. FS.....TW	500	4000			
10	Avery, 40 mi E of Red Ives RS Ag. FS.....TW	500	2500			
11	Avery, Commerce, Pub. Rds.....Drum	200	2000			



[fol. 254]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
12	Boise, Bur. Land Mgmt., Int. Barracks Area..TW	1000	6000	.297	.045	.2520
13	Boise, Predator & Rodent Control, Int., F&M.....TW	500	2000	.297	.045	.2520
14	Boise, 1 mi from Veterans Admn....TW	500	6000	.297	.045	.2520
15	Boise, Repair Shop Ag.FS.....TW	1000	4000	.207	.045	.2520
16	Boise, WF., Ag. FS.....TW	1000	15,500	.297	.045	.2520
17	Boise, 37 mi E of Cottonwood RS., Ag., FS.....TW	1000	4500			
18	Boise, 56 mi NE of Garden Valley RS., Ag., FS .....TW	1000	4000	.299	10171	.2819
19	Boise, 63 mi NE of Beaver Creek GS., Ag.FS.....TW	1000	2000			
20	Boise, 70 mi E of Dutch Creek Brush Camp, Ag.FS....TW	1000	2000			
21	Boise, 80 mi NE of Lowman RS., Ag.FS, TW	1000	2500	.307	.0149	.2921

FSC GROUP 91 - GASOLINE

8

November 1, 1959 through

Region 10

October 31, 1960

Item No.	Ordering Activity and form of delivery	Average Order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>IDAHO(Continued)</u> <u>Regular Gasoline</u>						
22	Bonnere Ferry, Irr. & Nat. Serv. TW	250	3000			
23	Bonnere Ferry, 2 1/2 mi. S of RS., Ag. FS ..... TW	500	12,000			
24	Burley, Bur. Land Mgmt., - Grazing District ..... TW	1000	12,500	.293	.0491	.2439
25	Burley, Bur. Land Mgmt. Int. .... TW	1000	6000	.293	.0491	.2439
26	Calder, 26 mi E of St. Maries, Ag. FS ..... TW	500	4000			
27	Carey, 12 mi W of Interior, Bur. of Reclam. .... TW	500	2000	.299	.0493	.2497
28	Cascade, 20 mi E of Commerce, Bur. Public Roads Drum	200	2000	.315	.0463	.2687
29	Cascade, 30 mi SW of High Valley RS, Ag. FS .... TW	1000	2000	.310	.0233	.2867
30	Cascade, 37 mi E of Landmark RS, Ag. FS ..... TW	1000	7000	.340	.0533	.2867

[fol. 256]

Item No:	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
319	Cascade, 85 mi E of Elk Creek RS Ag.FS.....TW	1000	2000	.345	.0533	.2917
32	Challis, NF., Ag. FS..... TW (For use above 6000 ft.Altitude)	1000	15,000	.310	.0443	.2657
33	Clark Fork, RS. 1 1/4 mi N of Ag.FS .....TW	500	5500			
34	Clark Fork, Bur. Pub. Rds. Drum	200	2000			
35	Clarkia, 31 mi SE of St. Maries, Ag. FS .....TW (One tank at RS and one ERC Hdqtrs. 3/4 mile away.)	1000	16,000			
36	Coeur d'Alene 1/4 mi E of Fernan RS., Ag.FS .....TW	800	6500			
37	Coeur d'Alene, 23 mi NE of Exp. Station Ag.FS ..... TW	500	4000			
38	Coeur d'Alene, 25 <u>Unloaded Gasoline</u> mi SE of FAA...TW	900	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
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Regular Gasoline

39	Coeur d'Alene, 26-47 mi NE of: Magee RS & 4 adj. camps, Ag.FS.....TW	100	12,000			
40	Coeur d'Alene, 50 mi N of near Magee RS, Comm. Bar. Pub. RDs.....Drum	200	2000			
41	Council, Payette NF., Ag.FS ....TW (1500 gallons for use above 6000 ft. altitude)	1000	10,000	.310	.046	.2640
42	Council, 20 mi NW of Hornet Creek RS. Ag. FS.....TW (500 gallons for use above 6000 ft. altitude)	300	3000	.315	.046	.2690

Unleaded Gasoline

43	Crystal, 23 mi SE of Pocatello, FAA..TV.900	2000		.327	.01	.317
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Regular Gasoline

44	Dubois, 9 mi N of Ag., Exp.Sta...TW	700	12,000	.314	.0512	.2628
45	Dubois, 6 mi N of Exp. Station, Ag. FS.....TW	500	4000	.314	.0512	.2628

[fol. 258]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
46	Elk City, 1/2 mi N of Mesquite NE					
	RS. Ag.FS....Drum	275	2000			
47	Elk City, 6 mi W of Commerce, Bur.					
	Pub. RDs. ..TW-GD	400	6000			
48	Elk City, 13 mi SE of Red River RS.					
	Ag. FS .....TW	450	4000			
49	Elk City, 65 mi E of Grangeville, Red River RS., Ag.					
	FS .....TW	400	4450			
50	Emmett, 7 mi NE of Black Canyon Dam.					
	Int. Bur. of Reclam.					
	.....TW	500	3000	.298	.0436	.2544
51	Emmett, 50 mi NE of Sage Hen Camp,					
	Ag.FS.....TW	1000	4000	.333	.0436	.2894
52	Emmett, 50 mi N of Third Fork GS,					
	Ag.FS .....TW	1000	2000	.333	.0436	.2894
53	Forney, 6 mi SW of Cobalt RS.,					
	Ag. FS.....TW	450	2000	.324	.0382	.2858



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
34	Fort Hall, Bur.					
	Ind. Aff. Int...TW	900	45,000	.305	.0509	.2541
35	Grangeville,					
	Nesperces NW. Whse.					
	Ag. FS.....TW	450	8000			
36	Grangeville, 26					
	mi S of Adams RS,					
	Ag. FS.....TW	400	3300			
37	Grangeville, 27					
	mi E of Castle Creek					
	RS. AG. FS.... TW	450	2200			
38	Grangeville, 34					
	mi S of State Creek					
	RS, Ag. FS.....TW	500	3000			
39	Hagerman, 5 mi					
	SE of Interior					
	F&M.....TW	450	6000	.299	.0480	.2510
60	Hamer, 5 mi NW					
	of Camas NW Refuge					
	Int. F&M.....TW	1000	4000	.314	.0362	.2778
61	Idaho City, 1 mi					
	NW of Ag. FS ..TW	500	4000	.307	.04	.2670
62	Idaho City, 42 mi					
	E & N of Boise Ag.					
	FS .....TW	1000	5000	.307	.04	.2670

[fol. 260]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimate gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
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63 Idaho Falls, 550-

2nd St. US

AEC.....TT 7000 200,000

(a)f.o.b. bulk

plant posted price

date of bid \$.1905

.1905

.0325 .1580  
(Ex.State Tax)

Location of bulk plant

Salt Lake City

(b)f.o.b. activity,

transport truck delivered

price date of bid:

\$.2755

.2755

.0337 .2418

Regular Gasoline

64 Idaho Falls, 45-60

mi NW of AEC, Nat.

Reactor ..... TT 7000 1,000,000

(a)f.o.b. bulk plant,

posted price date of

bid \$.1905

.1905

.0325 .1580  
(Ex.State Tax)

Location of bulk plant

Salt Lake City

(b)f.o.b. activity,

transport truck, delivered

price date of bid:

\$.2755

.2755

.0311 .2444

65 Island Park,

RS.Ag.FS .....TW 400

3000

.3120

.0356 .2764

Item No.	Ordering activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
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66	Kellogg . of Kingston RS., AG. ....TW	300	5300			
67	Kooskia, 24 mi E of (Camp on Lochsa River) Comm. Pub. Rds..... Drum	200	2000			
68	Kooskia, 25 mi NE of Temp. Brush Camp, Ag.FS.....Drum	300	1000			
69	Kooskia, 29 mi E of Fenn RS., Ag.FS .....TW	300	3500			
				Unleaded Gasoline		
70	Kooskia, 29 mi E of Fenn RS. Ag.FS.....Drum	100	200			
				Regular Gasoline		
71	Kooskia, 49 mi E of Sherman Creek Camp, Comm. Bureau of Public Roads TW	500	4400			
72	Kooskia, 50 mi NE of Lochsa Work Center, Ag.FS Drum	300	1000			

[fol. 262]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
73	Mackay, Challis NF., Ag. FS...TW (For use above 6000 ft. altitude)	1000	2000	.310	.0493	.2607
74	McCall, Payette NF. Ag. FS.....TW	1500	40,000	.310	.0467	.2633
75	McCall, 40 mi E of Krasel Rs., Ag. FS.....TW (1000 gallons for use above 6000 ft. altitude)	1000	4000	.320	.0467	.2733
76	McCall, Bur. of Pub. Rds. ....Drum	200	2000	.315	.045	.2700
77	Mountain Home, 26 mi NE of Anderson Ranch Dam, Interior, Bur. of Reclam. TW	500	4000	.315	.0443	.2707
78	Mountain Home, 40 mi N of Laster Creek RS. Ag. FS.....TW	1000	2500	.315	.0593	.2557
79	Nampa, 6 mi SW of Deer Flat Nat'l W.L. Refuge F&WL Serv. ....TW	900	3000	.302	.0486	.2534
80	New Meadows, Payette NF. Ag. FS.....TW	1000	6000	.310	.0467	.2633

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduct. from posted price	Maximum price per gallon
81	Northfork, 6 mi N of RS. Ag FS.TW (For use above 6000 ft. altitude)	400	2000	.307	.0262	.2808
82	Northfork, 13 mi W of Indianola RS. Ag.FS.....TW	450	3000	.307	.0262	.2808
83	Oakley, Sawtooth <u>Regular Gasoline</u> NF.Ag.FS .....TW	500	2000	.293	.0362	.2568
84	Palisades, 6 mi E of Irwin, Bureau of Reclamation....TW	1200	20,000	.308	.0499	.2581
85	Palisades, 50 mi SE of Idaho Falls, Int.Bur. of Reclam. .....TW	1200	8000	.308	.0499	.2581
86	Paul, 5 mi W of Int. of Bur. Reclam.....TW	1000	23,000	.293	.0382	.2548
87	Pierce, Comm. Pub.Rds....Drum	200	2000			
88	Pierce, 27 mi NE of Bungalow RS. Ag.FS .....Drum	500	1500			
89	Pierce, 8/10 mi N of RS Af.FS TW	1000	18,000			



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	TDANO (Cont.)					
90	Pierce, 14 mi SE of: (Musselshell)					
	Ag. FS . . . TW	500	1000			
91	Pierce, 30 mi NE of: Near Bungalow					
	RS., Comm. Bur.					
	Pub. Rds. . . . Drum	200	2000			
92	Pierce, 51 mi. N. of Canyon RS.,					
	Ag. FS . . . Drum	500	1500			
93	Pierce, 55 mi. NE of: Kelly Creek					
	RS., Ag. FS. . . TW	500	3000			
94	Pocatello, 8 mi. W of: Portneuf, FS., Interior					
	Bur. Ind. Aff. . . TW	500	4000	.302	.0505	.2515
95	Patlatch, 3 mi. E of: Palouse RS.,					
	Ag. FS . . . TW	400	4500			
96	Powell RS., 60 mi. SW of					
	Missoula, Montana, Comm. Pub					
	Rds. . . . Drum	200	2000			

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
<u>IBAND (Cont.)</u>						
97	Priest Lake, HallsPELL Bay, Ag. Ps. . . . TV	1000	13,000			
98	Priest River, 37	700	8000			
99	Priest River, 9 mi. N. of: Falls RS., Ag. PS .TV	300	6000			
100	Priest River, 25 mi. NE of: Ag. PS. . . . . TV	300	4000			
101	Riggins, RS., Ag. Ps . . . . TV	300	4500	.310	.0361	.273
102	Rupert, Bru. of Reclam. Inter- ior . . . . . TV	1000	70,000	.293	.0479	.2451
103	Rupert, 7 mi E. of: Int., Bur, Reclam. . . . TV	1000	23,000	.293	.0479	.2451
104	Rupert, 12 mi NE of: Int., Bureau of Reclamation Dam	850	11,000	.293	.0479	.2451
105	Rupert, Int., Bur. of Reclam. . . . . . TV	1000	24,000	.293	.0479	.2451

Item No.	Ordering Activity and form of delivery IDANO (Cont.)	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deducted from posted price	Maximum price per gallon
106	Rupert, 12 mi. NE of: P&WL TW	500	2000	.293	.0479	.2451
107	St. Maries, 15 mi E of: Commerce, Bur. of Pub. Rds. ..... Drum	200	2000			
108	Salmon, 1 mi S of Bureau of Land Management . TW	1500	2400	.307	.0362	.2708
109	Salmon, NW., Ag. FS (5000 gallons for use above 6000 ft. altitude) . TW	900	11,100	.307	.0362	.2708
110	Salmon, 6 mi. SW of Yellojacket RS., Ag. FS . TW	450	2000	.337	.0362	.3008
111	Salmon, 36 mi SW of Cobalt RS Ag. FS . . . TW	450	2000	.324	.0382	.2858
112	Sandpoint, Kani- kwa NW., RS., Ag. FS . . . TW	900	9000			
113	Shoshone, Bur. Land Mgmt. TW	700	15,500	.299	.0493	.2497

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	<u>IDaho (Cont.)</u>					
114	Stanley, Cohn. Pub.Rds Drum	400	2000	.298	.0130	.2850
115	Twin Falls, Entomology Research Division, ARS., Ag. TW	500	2000	.294	.0469	.2471
116	Wallace, 26 mi. N. of Shoshone Camp, Ag. FS TV	500	4500			

MONTANA

State tax in the amount of \$\_\_\_ is included

( ) excluded ( ).

(Bidder please indicate which is applicable. If no indication is made by the bidder, it will be understood that the State Tax is included in prices quoted.)

Regular Gasoline

117	Arlee, 4 mi. E of: Int., Ind.					
	Aff. TW	500	1000			
118	Ashland, Comm., Bru.Pub.RdsDrum	200	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>MONTANA (Cont.)</u>						
<u>Unleaded Gasoline</u>						
119	Aven, 17 mi NE of Deer Lodge, FAA TW	900	2000			
120	Babb, 8 mi. W of: Natl. PS TW	500	1500			
<u>Unleaded Gasoline</u>						
121	Belgrade, 20 mi NW of: FAA TW	900	2000			
122	Big Fork, 20 mi SE of: Swan Lake RS., Ag. PS TW	500	1000			
<u>Unleaded Gasoline</u>						
123	Billings, 23 mi SE of: FAA TW	900	2000			
124	Box Elder, 37 mi S of Havre, Indian Affairs .....TW	1200	20,000			
125	Bozeman, 5 mi NE of: Interior, F&WI TW	450	2000			
125a	Billings, 421 N. 24th on 4th Ave., N & 8th Sts. (but not both) Inter-agency Motor Pool, CSA, FSS .....TW	800	25,000			



November 1, 1935 through October 31, 1959. FSC Group 91 - Region 10

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA (Cont.)						
133	Bowman, 5 mi NE					
	of: Int. F&W. TW	450	1800			
134	Bowman, 26 mi SW					
	of: Ag. FS TW	900	3400			
135	Browning, Black-foot Ind. Ag., Interior, bulk tanks	TT 7000	70,000			
136	Camp Crook, S. Dak. Custer NF., Mont., Ag. FS TW	500	2000			
137	Chester, 19 mi SW of: Tiber Dam, Bureau of Reclam.					
	..... TW	500	2000			
138	Columbia Falls, 21 mi N of: Big Cr. RS., Ag. FS					
	..... TW	500	8000			
139	Columbia Falls, 30 mi N. of: Polebridge, NPS					
	..... TW	900	3600			
140	Columbia Falls, 46 mi N of: Ford RS., Ag. FS TW	500	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA (Cont.)						
141	Creston, 13 mi E of Kalispell, F&W L TW	500+	2000			
142	Custer Nat'l. Monument, 3 mi S of Crow Agency, Int., WFS TW	500	2000			
143	Cut Bank, Comm. Bureau of Public Roads Drum	200	2000			
144	Darby, Bitterroot NF., Ag. FS ..... TW	750	9000			
145	Darby, 20 mi SW of: Bitterroot NF., Ag. FS., West Fork RS TW	500	4000			
146	Darby, 20 mi SE of: Sula RS., Ag. FS TW	500	4000			
147	Darby, 47 mi SW of: Magruder RS., Ag. FS TW	750	3000			
148	Dillon, Beaverhead NF., Ag. FS ..... TW	450	7000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>MONTANA (Cont.)</u>						
149	Dixon, 2 mi NE of: Flathead Ag.	TW	1000	12,000		
150	Dixon, 2 mi NE of: Flathead Ag.	TT	6000	16,000		
151	Drummond, 9 mi SW of: CAA	TW	900	2000		
152	East Glacier Park, Int., NPS	TW	800	3200		
153	East Glacier, Comm., Bureau of Public Roads	Drum	200	2000		
154	Etalaka, Bureau of Land Mgt.	Drum	110	330		
155	Elliston, Comm. Bureau of Public Roads	Drum	200	2000		
156	Ennis, Comm. Bureau of Public Roads	Drum	200	2000		
157	Ennis, 13 mi S of: F&WL	TW	1000	8500		

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA (Cont.)						
158	Essex, Comm.					
	Pub.Rds. Drum	200	1000			
159	Eureka, Imm. & Nat., Border					
	Patrol TW	200	2000			
160	Eureka, 11 mi W of: Rexford					
	RS., Ag.FS TW	500	8000			
161	Eureka, 11 mi W of Rexford RS.,					
	Ag.FS Drum	50	50			
162	Eureka, 16 mi SE of: Ant Flat RS.,					
	Ag.FS TW	400	9000			
163	Fort Harrison, 5 mi W of Helena,					
	VA TW	800	8000			
164	Fort Peck, 19 mi S of Glasgow,					
	F&WL TW	500	2000			
165	Frazer, 5 mi SE of: Int., Ind.,					
	Ag. TW	300	2000			
166	Gallatine Gate-way, 35 mi S of: Comm.Bur.Pub.					
	Rds. TW	300	3000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<b>MONTANA(Cont.)</b>						
167	Great Falls, 5 mi S of City Center, Montana					
	AMC TW	3000	18,000			
168	Great Falls, 5 mi S of City Center, Montana					
	AMC TW	3000	18,000			
169	Hardin, 13 mi SE of: Bureau of Ind. Aff., Crow Agency					
	TW	900	16,000			
170	Hardin, 40 mi SE of: Tongue River Boarding School, Busby					
	TW	1000	10,000			
171	Harlem, 4 mi E of: Fort Belknap Cons.Ag.Bur.Ind. Aff.					
	TW	12,000	36,000			
172	Harlem, 4 mi E of: Fort Belknap Agency					
	TT	3000	30,000			
173	Harlem, 4 mi E of: Fort Belknap Agency					
	TW	1000	36,000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA(Cont.)						
174	Hauser, 15 mi N of Helena, CAA					
	..... TW	900	2000			
175	Havre, 8 mi W of: S & W Conv., Division, ARS					
	TW	500	2000			
176	Havre, 17 mi NW of: Fresno Dam, Int., Bur.					
	Reclam. TW	500	1000			
177	Helena, Ag. FS					
	..... TW	800+	5000			
178	Helena, 24 mi NE of: (Canyon Ferry) Int., Bur.					
	Reclam. TW	1000	10,000			
179	Hot Springs, Int., EPA					
	TW	300	3000			
180	Hot Springs, Flathead Agency					
	..... TW	500	3000			
181	Hungry Horse, 24 mi E of Kalispell, Int., Bur. Reclam.					
	..... TW	800	10,000			



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA(Cont.)						
182	Huntley, 4 mi E of: Branch Station Research Serv. Ag.....TW 500	3000				
183	Huntley, 4 mi E <u>Unleaded Gasoline</u> of: Branch Station Research Serv. Ag.....TW 500	1000				
184	Lame Deer, 57 <u>Regular Gasoline</u> mi SE of Hardin, No. Cheyenne Agency .....TW 1000	3000				
185	Lewistown, on airport road, F&W.....TW 550	5000				
186	Libby, 1 mi N of: Ag., FS...TW 800	14,000				
187	Libby, 1 mi N <u>Unleaded Gasoline</u> of: Ag., FS.. ..... Drum 55	200				
188	Libby, 24 mi <u>Regular Gasoline</u> NE of: Warland RS., Ag. FS..TW 500	4000				
189	Libby, 3 mi SE of: Raven RS., Ag. FS.....TW 500	3600				

[fol. 276]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
MONTANA (Cont.)						
190	Limestone, 3 mi NW of: Meyers Creek RS., Ag., FS.....TW	400	2000			
191	Lincoln, 1.5 mi E of: RS., Ag. FS....TW into GD	500+	2000			
192	Livingston, 30 mi S on Hiway 89, (US)Bur.Pub.Rds. Trail Creek RS .....Drum	200	2000			
193	Lonepine, 1½ mi N of: Bureau Ind. Aff.....TW	700	1400			
194	Lolo Hot Springs, (40 mi beyond Lolo) Bur.Pub.Rds...TW	300	2000			
195	Malta, Bur.Land Management *Drum	---	3500			
196	Malta, 7 mi E of: F&WL....TW	500	4000			
197	Malta, 83 mi S of: Sipery Ann Game Station, F&WL.....TW	550	4000			

\* Pick up at contractor plant Malta.  
If contractor not local TW deliveries required f.o.b. ordering  
office, 400 gallons average order.

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	MONTANA(Cont.)					
198	Martin City. 1 mi E of: Coram RS., Ag., FS. TW	500	5000			
199	Martin City, 25 mi S of: Anna Cr., Station, Ag. FS.....TW	500	1000			
200	Martin City, 32 mi S of: Betty Cr., Station, Ag., FS. .....TW	500	1000			
201	Martin City, 50 mi SE of: Spotted Bear RS., Ag. FS.....TW	500	2000			
202	Medicine Lake, <u>Regular Gasoline</u> 2 1/2 mi SE of: F&WL.....TW	800	3000			
203	Miles City, VA Hospital.....TW	500	2000			
204	Miles City, 3 mi W of: Livestock Exp. Sta., Ag. Animal Ind....TW	500+	18,000			
205	Miles City, 4 mi NW of F&WL....TW	200	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>MONTANA (Cont.)</u>						
206	Missoula, Comm. Pub.RDs. TW	400	4000			
207	Missoula, 14th & Catlin St., Eng. Shop, Ag.FS TW	*800	13,000			
208	Missoula, 7 mi W of: Aerial FD Whse., Ag.FS. TW	500	6000			
209	Missoula, 26 mi E of: Bonita RS., FS.....TW	800	2400			
210	Missoula, 27 mi W of: Ninemile RS., FS.....TW	800	3000			
211	Missoula, 30 mi SW of: Lolo RS, FS.....TW	800	3000			
212	Missoula, 30 mi SW of: Lolo RS. FS.....TW	500	4000			
213	Missoula, 60 mi SW of: Powell RS. FS.....TW	1000	6000			
214	Missoula, 60 mi N of: Seeley Lake RS., Nat'l.F., FS.....TW	900	3500			

\*Into underground storage tank

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	MONTANA(Cont.)					
215	Moiese, Int. F&WL,.....TW	1000	5000			
216	Moiese, 3 mi NE of Charlo, Int. F&WL,.....TW	500	2000			
217	Monida, 30 mi E of: Red Rock Hdqtrs., Int. F&WL .....TW	500	4000			
218	Monida, 30 mi F of: Red Rock Hdqtrs. Int. F&WL....TW	400	800			
219	Neihart, Comm. Bur. Pub. Rds. Drum	200	2000			
220	Noxon, 1 mi W of: RS, Ag. FS..TW	500	4000			
221	Pablo, 4 mi E of Irrig. Camp Bur. End. Aff.....TW	500	2500			
222	Perma, 3 mi NE of: Winter Range, Ag. FS.....TW	500	2000			
223	Phillipsburg, Comm. Bureau of Public Roads Drum	200	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>MONTANA(Cont.)</u>						
224	Phillipsburg, 1 mi S of: Ag.					
	FS.....TW	300	4000			
225	Plains, RS.,					
	FS.....TW	500	2500			
226	Plains, 40 mi N of: Lolo NF.,					
	Bend RS.FS...TW	500	1000			
November 1, 1959 through October 31, 1960						
FSC GROUP 91-GASOLINE						
<u>MONTANA(Cont.) Regular Gasoline</u>						
Region 10						
219	Trout Creek, 4 mi W of RS., Ag.					
	FS.....TW	400	4400			
220	Troy, 1 mi N of:					
	RS., Ag.FS...TW	500	6000			
221	Troy, 24 mi N of:					
	Sylvanite RS., Ag.					
	FS.....TW	500	8500			
222	Troy, 24 mi N of:					
	<u>Unleaded Gasoline</u>					
	Sylvanite RS,					
	Ag.FS.....Drum	50	1000			
223	West Glacier, Comm.					
	<u>Regular Gasoline</u>					
	Bureau of Public					
	Roads.....TW	300	2000			
224	West Glacier, Comm.					
	Bureau of Public					
	Roads					
	Drum	200	2000			



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>MONTANA(Cont.)</u>						
225	West Glacier, 4 mi N of: Interior NPS .....TT	8000	24,000			
226	West Glacier, 30 mi NE of: Interior NPS, Garden Wall .....TW	700	3500			
227	Whitefish, 20 mi W of:Tally Lake RS., Ag. FS....TW	500	1000			
228	White Sulphur Springs, Comm. Bureau of Pub.. Rds. Drum	200	2000			
229	Wlota, 7 mi SE of: Nashua, Int. Bureau of Ind. Aff.....TW	300	2000			
230	Wisdom, Comm. Bureau of Pub. Roads.... Drum	200	2000			
231	Wolf Point, Irrig. Camp Site, Interior Indian Affairs .....TW	300	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	<u>OREGON</u>					
	State tax in the amount of \$.06 included(X) excluded ( ) (Bidder please indicate which is applicable. If no indication is made by the bidder, it will be understood that the State Tax is included in prices quoted.)					
232	Agness, Comm. Bur. <u>Regular Gasoline</u>					
	Pub.Rds.     a Drum 200	2000				
233	Albany, Int.					
	Bur. of Mines.TW 1000	5000				
234	Albany, 5 mi SW					
	of Int.BPA. Drum 100	3000				
235	Alma, 17 mi SE of					
	Crow, Comm. Bur.					
	Pub.RDS.....TW 500	4000				
236	Ashland, 25 mi					
	E of Howard Prairie					
	Dam site, Bur. of					
	Reclam. ....TW 800	4000				

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
OREGON(Cont.)						
237	Astoria, 5 mi E of: Comm., Maritime Admin. Reserve Fleet..TW 700		16,000			
238	Astoria, 5 mi W of: Tongue Point, Treas.CG....TW	500	7050			
239	Austin, Comm. Bur.Pub.Rds. .....Drum	200	2000			
240	Baker, Ag., FS.....Drum	400	1500	.299	.0318	.2672
241	Baker, Ag. FS.....TW	450	18,000	.299	.0316	.2672
242	Baker, Bureau of Land Manage- ment.....TW	500	7000	.299	.0318	.2672
243	Bates, 2 mi S of:Blue Mt., RS., Ag.FS.....TW	400	4500			
244	Beatty, 13 mi W from Bly, Interior, Bur.of Ind. Aff. .....TW	400	4000			
245	Beaver, Comm. Bureau of Pub. Rds.....Drum	200	2000			

[fol. 284]

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
	OREGON (Cont.)					
246	Belknapp Springs, Comm. Bur.Pub.					
	Rds.....TW	200	2000			
247	Bend, Ag.FS.TW	500	34,000			
248	Bend 5 mi E of Nursery, Ag.FS.TW	500	3000			
249	Bend, 24 mi SW of: Ranger Dist. Deschutes NF.TW	500	3000			
250	Bend, 35 mi W of Elk Lake, Comm. Bur.Pub.Rds. Drum	200	2000			
251	Blue River, Comm. Pub.Rds.....Drum	200	2000			
252	Bly, 43 mi W of Lakeview, Ag., Forest Service.TW	500	6000			
253	Burns, Comm.Pub. Rds.....Drum	200	2000			
254	Burns, Bureau of Land Management .....TW	500	16,000			
255	Burns, Ochoco NF, Ag.FS.Drum (Pick up by agency- contr ctor-owned drums)	50+	1500			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
OREGON(Cont.)						
256	Burns, 4 mi W of: Ochoco NF., Ag.FS.....TW	500	3600			
257	Burns, 7 mi S of: Ag.Re.Serv., Exp.Station..TW	1000	6000			
258	Burns, 21 mi N of Crow Flat GS.,Ag.FS...TW	250	1000			
259	Burns, 32 mi NW of:Blue Creek Camp,FS.....TW	500	3000			
260	Burns, 40 mi NE of:Cold Spring Work Center,FS.TW	500	5000			
November 1, 1958 through October 31, 1959				FSC Group 91-Region 10		
273	Bend, 5 mi E of <u>Regular Gasoline</u> (Nursery), Ag.FS. .....TW	500	3000			
274	Bend, 24 mi SW of: Ranger Dist., Deschutes NF.TW	500	3000			
275	Bend, 30 mi SE of: Fort Rock, RD. Deschutes NF..TW	500	1000			

[fol. 286]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
OREGON (Cont)						
276	Bend, 30 mi SE of: Fort Rock RD., Deschutes NF.....Drum	50	50			
						<u>Unleaded Gasoline</u>
277	Bend, 50 mi SE of: China Hat GS. Deschutes NF.TW	500	500			
						<u>Regular Gasoline</u>
278	Bend, 50 mi SE of China Hat GS. Deschutes NF. ....Drum	50	50			
						<u>Unleaded Gasoline</u>
279	Blue River, Comm. Pub.Rds...Drum	200	2000			
						<u>Regular Gasoline</u>
280	Bly, 43 mi W of Lakeview, Ag. FS.....TW	500	6000			
281	Brookings, Comm. Pub.Rds...Drum	200	2000			
282	Burns, Comm. Pub.Rds...Drum	200	2000			
283	Burns, Bur.Land Mgt.....TW	500	14,000			
284	Burns, Ochoco NF, Ag. FS.*Drum	50+	1500			
285	Burns 7 mi S of Ag.RE.Serv.Exp. Station...TW	1000	6000			

\*Pick up by agency - contractor-owned drums



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
OREGON (Cont.)						
286	Burns, 7 mi S of Sec. 5, Ag.Re. Serv.....TW	500	6000			
287	Burns, 21 mi N of Crow Flat Guard Station, Ag.FS:.....TW	250	1000			
288	Burns, 32 mi NW of: Blue Creek Camp, FS....TW	500	3000			
289	Burns, 40 mi NE of: Cold Spring Work Center, FS. .....TW	500	5000			
290	Burns, 42 mi W of: Ag. Res. Service....TW	2000	8000			
2919	Burns, 42 mi W of: Squaw Butte Exp. Sta. Ag. Res. Serv.....TW	500	4000			
292	Burns, 50 mi NW of: Allison RS., Ag.FS..TW	500	2400			
293	Burns, 54 mi NE of: Van Guard Station, G.FS.TW	500	1500			

[fol. 288]

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
<b>OREGON(Cont.)</b>						
294	Burns, 32 mi SE of:F&WL Hdqtrs.Station .....TW	1000	9000			
295	Burns, 42 mi SW of:F&WL Double "O"Ranch..TW	#500	2000			
296	Burns, 43 mi S of:F&WL Buena Vista.....TW	1000	9000			
297	Burns, 63 mi S of:F&WL, P-Ranch .....TW	#500	2000			<u>Regular Gasoline</u>
298	Butte Falls, 31 mi NE of Medford RS, Ag. FS...TW	500	4000			
299	Carlton, Comm. Pub. RDs...Drum	200	2000			
300	Cave Junction, Ag. FS.....TW	300	7000			
301	Cave Junction, Ill. Valley AP Ag. FS .....TW	500	3000			
302	Cave Junction, 7 mi from:Ag. FS. .....TW	500	2000			

#Balance of TW load can ordinarily be taken by Buena Vista or Hdqtrs. Station.

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
	<u>OREGON (Cont.)</u>					
303	Chemawa, 6 mi N of Salem, Bur. of Ind.Aff...TW	1000	13,200			
304	Chiloquin, 6 mi W of: Int. Bur. of Ind.Aff...TW	600	46,000			
305	Coos Bay, 10 mi SW of: Lifeboat Sta., Treas. CG. .....TW	800	4000			
306	Corvallis, Ag., ARS.....TW	200	800			
307	Crescent, Ag., FS.....TW	500	6000			
308	Crescent, 12 mi W of: Dell Camp, Ag. FS.....TW	500	3000			
309	Dale, 50 mi S of Pilot Rock, Dale RS., Ag. FS .....TW	400	2000			
310	Detroit, 2 mi W of: Ag. FS..TW	750	12,000			
311	Diamond Lake, 25 mi W of: Ag. FS.....TW	400	10,000			

[fol. 290]

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
OREGON(Cont.)						
312	Diamond Lake, 90 mi E of Roseburg, Ag. FS.....TW	400	1200			
313	Disston, 3 mi N of: Ag.FS.TW	400	4000			
314	Dufur, 14 mi S of The Dalles, FS.....TW	420	8000			
315	Enterprise, FS.....Drum	---	1000			
316	Enterprise, FS .....TW	440	7500			
317	Enterprise, Comm. Pub.Rds. Drum	200	2000			
318	Estacada, 21 mi SE of: Comm. Pub. Rds.....TW	250	2000			
319	Estacada, 22 to 30 mi SE of: FS .....TW	420	38,000			
320	Estacada, 11 mi E of:F&WL...TW	600	3000			
321	Eugene, Ag. FS.....TW	500	6000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	OREGON (Cont.)					
322	Eugene, Vehicle Maintenance Fac.					
	Post Office...TW	6000	28,100			
323	Fall Creek Guard Station.....TW	400+	5000			
324	Flora, Comm.					
	Pub.Rds....Drum	200	2400			
325	Fort Klamath, 4 mi W of Seven Mile					
	GS,Ag.FS...TW	500	2000			
326	Fort Rock, 10 mi N of Ft.Rock,					
	Cabin Lake GS,					
	Ag.FS.....TW	500	3000			
327	Foster, Comm.					
	Pub. Rds...Drum	200	2000			
328	Foster, 9 mi E of Ag.FS....TW	700	3000			
329	Galice, Comm.					
	Pub.Rds...Drum	200	2000			
330	Gardiner, 30 mi NE of:Smith River					
	Camp, Comm.Pub.					
	Rds.....TW	300	2000			

[fol. 292]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
ORSON (Cont.)						
331	Garibaldi, Till-smook Bay, Life-boat Station, Treas.CG....TW	800	2000			
332	Glendale c/O W Fork Log Camp, 23 mi W; Comm. Pub. Rds...Drum	250	2000			
333	Glide, RS.Ag., FS.....TW	400	4000			
334	Glide, 25 mi NE of Steamboat Cr., Camp, Comm. Pub. Rds.....Drum	300	2000			
335	Glide, 8 mi E of Hill Cr.Camp, Comm. Pub.Rds. .....Drum	200	2000			
336	Gold Beach, Ag. FS.....TW	500	2000			
337	Goshen, 7 mi S of Eugene, Int. BPA.....TW	500	20,000			
338	Government Camp, Comm. Public Roads .....Drum	200	2000			



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>GALSON (Cont.)</u>						
339	Grants Pass, Ag, FS.....TW	930	12,000			
340	Grants Pass, Int. Bureau of Reclamation.. .....Drum	200	600			
341	Grants Pass, 28 mi NW of: RS, Ag, FS....TW	500	7000			
342	Gresham, 30-42 mi E of FS.TW	420	7000			
343	Halfway, Comm. Pub.Rds.....Drum	200	2000			
344	Hammou, Pt. Adams Lifeboat Station, Treas. CG.....TW	500	2000			
345	Hardman, Comm. Pub.Rds.....Drum	200	2000			
346	Hebo, Suislaw NF, Ag, FS.....TW	400	7600			
347	Heppner, Comm. Pub.Rds.....Drum	200	2000			
348	Heppner, Ag.Fs .....FTW	400	2500			

\*110 gallons into GD

[fol. 294]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
OREGON (Cont.)						
349	Heppner, 35 mi S of: Tupper GS., Ag.FS.....*TW	400	2000			
350	Hood River, Comm. Pub.Rds. Drum	200	2000			
351	Imnaha, 24 mi S of: Bur. Pub. Rds. ....TW	500	2000			
352	Jacksonville, 16 mi S of: Star RS., Ag.FS..TW	875	3600			
353	John Day, Ag. FS.....Drum	33	300			<u>Unleaded Gasoline</u>
354	John Day, Ag. FS.....TW	900	11,000			<u>Regular Gasoline</u>
355	John Day, Comm. Pub. Rds. Drum	200	2000			
356	John Day, 26 mi SW of: Bear Valley RS., Ag.FS...TW	400	2500			
357	Joseph, Comm. Bur. Pub. Rds. Drum	200	2000			
358	Kamela, 21 mi SE of Pendleton CAA.....TW	900	2000			<u>Unleaded Gasoline</u>

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	OREGON (Cont.)					
359	Klamath Falls, Comm. Pub.Rds. .....Drum	200	2000			
360	Klamath Falls, 39 mi NW of: RS.Ag.FS...TW	500	3200			
361	LaGrande, 8 mi NW of:CAA..TW	900	2000			
362	LaGrande, 13 mi SE of:CAA..TW	900	2000			
363	LaGrande, 20 mi W of:CAA...TW	1200	4000			
364	Lakeview, Bur. Land Mgt...TW	500	10,000			
365	Lakeview, 2 mi N of:Ag.FS..TW	500	30,000			
366	Lakeview, 65 mi E of:(f.o.b.Hart Mt.Refuge)F&WL .....TW	1200	5000			
367	Lowell, West Boundary RS. Ag. FS.....TW	750	3000			
368	Madras, 15 mi NW of: Int.Ind. Aff.....TW	1000	16,000			

[fol. 296]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Ant. to be deduc. Maximum price posted per gallon
<u>OREGON (Cont.)</u>					
369	Mapleton, Suislaw				
	NP.....TW	340	9300		
370	Maupin, 24 mi				
	SW of:Ag.FS.TW	420	7600		
371	McKenzie Bridge				
	RS.Ag.FS....TW	400	4000		
372	Medford 1 mi E				
	of:Ag.FS....TW	800	11,000		
373	Medford, 1 mi				
	S of:Int.Bureau of Land Management.....TW	700	3600		
374	Medford, 9 mi NE				
	of: Camp White				
	VA.....TW	800	16,420		

November 1, 1939 through October 31, 1960 FSC GROUP 91-GASOLINE

Region 10

355	Parkdale, Comm. <u>Regular Gasoline</u>				
	Pub.Rds....Drum	200	2000.		
356	Parkdale, Hood				
	River Ranger Dist.				
	Ag.FS.....TW	430	11,000		
357	Paulina, 15 mi				
	NE of:Rager RS.,				
	Ag.FS.....TW	500	6300		

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc from posted price	Maximum price per gallon
OREGON (Cont.)						
358	Pendleton, Umatilla					
	NF, Ag. FS. .... TW	500	8000	.295	.0352	.2598
359	Pendleton, 6 mi E of: Interior,					
	Indian Affairs TW	500	7500	.295	.0352	.2598
360	Pendleton, 10 mi NE of: Ag. ARS,					
	SWC Research					
	Branch. .... TW	500	2000	.295	.0352	.2598
361	Philomath, Comm.					
	Pub. Rds. .... Drum	200	2000			
362	Pine, Wallows-					
	Whitman NF. Ag.					
	FS. .... TW	440	5000			
363	Portland, Service					
	Shop, 2760 NW					
	Yeon, Ag. FS. TW	750	4500			
364	Portland, Interior,					
	BPA. .... TW	1300+	80,000			
365	Portland, VA					
	Hospital. .... TW	500	10,000			
366	Portland, P.O.					
	Vehicle Service,					
	238 NW 12th Avenue					
	..... TW	1700	199,400			

[fol. 298]

Item No.	Ordering Activity and form of delivery	Average order salienta	Estimated salienta	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per salienta
OREGON (Cont.)						
367	Portland, Contractor's Marine Terminal, Treas., CG ..... Marine	200	6000			
368	Portland, Wilamette Nat'l. Cemetery TW	900	5000			
369	Port Orford, Lifeboat Station, 3 mi. SW of Treas. CG ..... TW	1000	2000			
370	Powers, Siskiyou NF., Ag., FS TW	500	5000			
371	Powers, 15 mi. S. of Ag., FS TW	440	7000			
372	Prairie City, 34 mi. S. of Crane Prairie GS, Malheur NF ..... TW	500	6000			
373	Prineville, Bur. Land Management (*Pickup at contractor's plant)	50	500			
374	Prineville, Ochoco NF., Ag., FS ..... Drum	50	1500			
375	Prineville, Ochoco NF., Ag., FS ..... TW	500	22,000			
376	Prineville, 25 mi E of: Ochoco RS, Ag. FS ..... TW	500	7750			
377	Prineville, 30 mi E of: Ochoco NF. Cold Springs Camp, Ag, FS ..... TW	500	2500			



Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>OREGON (Cont.)</u>						
378	Prineville, 60 mi E of: Ochoco NF., Happy Camp					
	Ag.FS.....TW	400	2000			
379	Reedsport, Comm.		<u>Regular Gasoline</u>			
	Pub.Rds...Drum	200	2000			
380	Riddle, Comm.					
	Pub.Rds...Drum	200	2000			
381	Roseburg, 2 mi W of: VA Hosp.					
	.....TW	400+	10,000			
382	Roseburg, 1 mi E of: Umpqua NF.					
	Ag.,FS.....TW	400	5000			
383	Roseburg, 45 mi E of: Umpqua NF.,					
	Ag.,FS.....TW	400	6500			
384	Roseburg, 62 mi E of: Toketee RS.,					
	NF.....TW	400	5000			
385	Salem, 3 mi of:					
	Int.BPA...TW	400	12,000			
386	Scottsburg, Comm.					
	Pub.Rds...Drum	200	2000			
387	Silver Lake, Bureau of Land Management, Int.					
	Int.TW	300	7200			

[fol. 300]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Ant. to be deduc. from posted price	Maximum price per gallon
OREGON (Cont.)						
388	Silver Lake, 97 mi. NW of Lakeview, Ag. FS.....TW	500	9000			
389	Simnasho, Warm Springs Indian Agency, Int. Bur. Ind. Aff.....TW	500	2000			
390	Sisters, Deschutes NF., Ag. FS...TW	500	12,000			
391	Sixes, 6 mi W of: Cape Blanco, Loran Trans. Sta., Treas. CG.....TW	500	2600			
392	Sweet Home, 12 mi E of: Cascadia RS, Ag. FS...., TW	500	5000			
393	Sweet Home 42 mi. E of: Fish Lake GS., Ag. FS*....TW	500	3000			
(*Items 392 & 393 Award to one Contractor)						
394	Talent, Rogue River Project, Bur. Reclam., Camp White....TW	800	20,000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	OREGON (Cont.)					
395	Taft, Comm. Pub. Rds.....Drum	200	2000			
396	The Dalles, 4 mi E of: Interior, BPA.....TW	800	16,000			
397	Tiller, 24 mi E of Canyonville; Ag.,FS.....TW	400	10,000			
398	Ukiah Comm. Pub. Rds.....Drum	200	2000			
399	Ukiah, 35 mi S of Pilot Rock; Ag.,FS.....TW	500	4000			
400	Union, Wallowa- Whitman NF.,Ag. FS.....TW	400	7500			
401	Unity, Wallowa- Whitman NF, Ag. FS.....TW	440	4000			
402	Vale, Interior, Bureau of Land Management:..TW	900	11,000			
403	Waldport, Siuslaw NF.,Ag.FS...TW	540	12,700			
404	Wallows, Whitman NF.,Ag.FS...TW	440	4000			

[fol. 302]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>OREGON (Cont.)</u>						
405	Warm Springs, Interior, Bureau of Indian Affairs .....TW	1000	20,000			
406	Willamina Comm. Pub. R.R. Drum	200	2000			
407	Winchester Bay, Umpqua River Lifeboat Station, Treas.CG...TW	300	2400			
408	Zigzag, Ranger Station, Mt. Hood NF, Ag. FS...TW	450	9000			

WASHINGTON

State tax in the amount of \$.065 is included (X) excluded ( ) (Bidder please indicate which is applicable. If no indication is made by the bidder, it will be understood that the State Tax is included in prices quoted.)

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
409	Amboy, Gifford Pinchot NF., Chelatchie RS., FS . . . . . TW	800	4500			
410	American Lake, 13 mi S of Ta- coma, VA Hosp- ital . . . . . TW	300	13,000			
411	Bellingham, Con- tractor's marine terminal, Treas., CG Marine		20,000			
	(Posted Price date of bid \$ )					
	Name and location of dock or stor- age tank.					
412	Benton City; 8 mi W of: Chandler Power Plant, Int., Bur. of Reclam. TW	280	1500			
413	Blaine, Imm. & Nat. Service, BP., (In City) . . . . . TW	550	3000			
414	Burke, 9 mi S of: Burke Junc- tion, Interior, Bur. of Reclam. TW	1000	10,000			

[fol. 304]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
415	Carson, Comm., Pub.Rds. Drum	200	2000			
416	Carson 10 mi NW of: Hemlock RS., Ag. FS....TW	400	10,000			
417	Carson, 10 mi NW of: Wind River Nursery, FS..TW	400	3500			
(Award items 416 & 417 to one contractor - Combined delivery of 400 gallons for both locations)						
418	Carson, 14 mi N of: FEWL..TW	650	4000			
419	Castle Rock, 48 mi E of: Spirit Lake RS., Ag. FS. TW	500	4200			
420	Castle Rock, 50 mi E of: Comm., Pub.Rds...Drum	200	2000			
421	Chehalis, 6 mi SW of: Int. BPA. .....TW	500	5000			



<u>Item No.</u>	<u>Ordering Activity and Form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
422	Chelan, Wenatchee NF., Lake Chelan Boat Co. Dock Ag. FS.....Drum	300	600			
423	Cheney, 6 mi S of: F&WL....TW	500	4000			
424	Cle Elum, Ag. FS.....TW-GD	500	4000			
425	Cle Elum, Comm. Pub.Rds...Drum	200	2000			
426	Cle Elum, 15 mi NW of: Liberty GS., Ag., FS..TW-GD550		2400			
427	Colville, 15 mi SE of: Interior F&WL.....TW	400+	3500			
428	Concrete, 10 mi N of: Komo Kulshan GS., Ag. FS....TW	500	5500			
429	Conconully, Chelan NF., Ag. FS....TW	400	3200			
430	Cook, 1 1/2 mi NE of: Interior, F&WL.TW	500	3200			
431	Cook, 5 mi NE of: Willard Station Interior F&WL.TW	500	4000			

[fol. 306]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
432	Cook, 5 mi from Western Fish Nutri. Lab. F&WL....TW	300	2000			
433	Coulee Dam, 1 mi S of: Interior, Bur. of Reclam. ....TW	4000	40,000			
434	Coulee Dam, Nat'l FS. Recreation Area.....TW	500	6000			
435	Curlow, 5 mi S of: Ag., FS. TW	400	3000			
436	Couger, 10 1/2 mi N of: Kalama Work Center, Ag. FS. TW	430	1500			
437	Darrington, RS., Ag. FS. ....TW	800	21,000			
438	Dayton; Umatilla NF., Ag. FS.. Drum	200	1000			
439	Ellensburg, 27 mi NE of: FAA....TW	900	2000			<u>Unleaded Gasoline</u>
440	Eltopia, Washing- ton Camp, 16 mi N of Pasco, Int. Bur. Reclam...TW	1000	50,000			<u>Regular Gasoline</u>

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
441	Elwha, 15 mi SW of Port Angeles					
	RS. Int. NPS...TW	1000	12,000			
442	Enumclaw, 32 mi E of Silver Creek					
	Work Center, Ag.					
	FS.....TW	1200+	5600			
443	Enumclaw, 40 mi SE of NPS, White River Park Entrance					
	.....TW	1000	13,000			
444	Ephrata, Int.					
	Bur. Reclam...TW	900	40,000			
445	Ephrata, 5 mi S of Int. Bur.					
	Reclam. Block 89					
	Winchester, Watermaster Section					
	.....TW	500	2000			
446	Ephrata, 11 1/4 mi N & E of: or 5 mi N of Soap Lake,					
	Int. Bur. of Reclam.					
	ADCO.....TW	500	4500			
447	Entiat, 12 mi NW of Steliko RS. Ag.					
	FS.....TW	500	4400			

[fol. 308]

<u>Item No.</u>	<u>Ordering Activity and form of delivery-</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
448	Everett, Coast Guard Moorings, Treas., CG..Marine 200	200	4400			
	Posted Price date of bid \$ _____					
	Name & Location of dock or storage tank _____					
449	Fairfax, 5 mi E of: Nat'l PS...TW	500	2000			
450	Forks, Comm. Pub. Rds....Drum	200	2000			
451	Friday Harbor, f.o.b. contractor's marine Terminal, Treas. CG....Marine ---	---	20,000			
	Posted Price date of bid \$ _____					
	Name & Location of dock or storage tank _____					
452	Glacier, District RS, Ag. FS.....TW	500	7000			
453	Granite Falls, Comm. Pub. Rds. ....Drum	200	2000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
454	Granite Falls, 11 mi E of: Ag. FS.....TW	450	5000			
455	Grays Harbor, (Aberdeen or Hoquiam) Treas.CG.....TW	---	5000			
456	Hanford, delivery point is located within 50 mi radius of Richland P.O. AEC.....TT	7000	500,000			
	(a) FOB bulk plant. Posted price on date of bid/ \$ .2675			.2675	.0312	.2363
	Location of bulk plant and RR serving it Pasco, Wn.-None					
	(b) FOB activity, transport truck, Delivered price date of bid \$.2419			.2675	.0256	.2419
457	Hoodspoint, Ag. FS.....TW	300	5000			
458	Hoquiam, 3/4 mi NW of: Moclips CG.Int.Ind.Aff. TW-GD	400	1600			

[fol. 310]

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
459	Hoquiam, .44 mi N of: Lake Quinalt Sta. Int. Bur. Ind Aff.....TW-GD	500	7000			
460	Ilwaco, 3 mi S of: Cape Dis- appointment Life- boat Sta. Treas. CG.....TW	300	3300			
461	Ilwaco, 13 mi N off F&WL....TW	500	3000			
462	Inchelium, 3 mi Nw of: Bur. of Ind. Aff.....TW	1000	5000			
463	Kaloloch, 30 mi Nw of Quinalt RS.....TW	500	3000			
464	Kent, 7 mi E of: Int. BPA....TW	500	30,000			
465	Keller, 2 mi S of: Bur. Ind. Aff. TW	500	3000			
466	Kettle Falls, Imp. & Nat. Serv. .....TW	250	2000			
467	LaPush, 13 mi SW. of Forks Lifeboat Station Treas. CG TW	400	2000			



<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
468	Leavenworth, Ag.					
	FS.....TW-GD	500	11,000			
469	Leavenworth, 3					
	mi S on Icicle					
	Creek Road					
	F&NL.....TW	500+	4000			
470	Leavenworth, 16					
	mi S of: At					
	Blewett Pass,					
	Hiway 99, Bur.					
	Pub.Rds.....TW	400	6000			
471	Leavenworth, 25					
	mi N of: Lake					
	Wenatchee RS., AG.					
	FS.....TW-GD	500	3500			
472	Longmire, NPS,					
	Mt. Rainier National					
	Park.....TW	3000+	60,000			
473	Lester, 17 mi					
	S of: Over					
	Stampede Pass,					
	Ag.FS.....TW	150	900			
474	Marblemount, 2					
	mi NW of: RS,					
	Ag.FS.....TW	450	4000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduct. from posted price	Maximum price per gallon
	WASHINGTON (Cont.)					
475	Mazama, 2 mi. W of Early Winters RS. Ag. FS....TW	400	4000			
476	McNeil Island, 16 mi SW of Tacoma, Justice, U.S. Penitentiary...TT	7000	84,000			
	(a) Penitentiary, f.o.b. activity by barge, posted price date of bid \$ _____ Marine deliveries in bulk of 10,000 gallons & Pumped direct from suppliers tank boat into storage tanks on McNeil Island. Minimum depth of water at U.S. Penitentiary dock, 19 ft. 3 inch standard steel threaded pipe coupling connection, at dock face, on					

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from Posted price	Maximum price per gallon
WASHINGTON (Cont.)						
	supply line to storage tank. Both tanks piped together on one supply line. (Deliveries to be between 8:00 a.m. & 4:00 p.m. Monday through Friday.) (b)F.O.B.. activity TT & McNeil Island Barge. (Deliveries to be same as above.)					
477	Mesa Camp, 14 mi SW of Connell; Interior, Bur. Reclam.....TW	1000	32,000			
478	Metaline Falls, 7 mi S of: Sullivan Lake RS.Ag.FS.TW	900	4000			
479	Mineral, 1 mi SW of: Ag.FS...Drum	100	500			
480	Mineral, 15 mi of Morton, Ag. Forest Service.TW	400	2000			
481	Moses Lake, Columbia Basin Proj.Int.Bur. Reclam. TW	800	20,000			

[fol. 314]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
482	Mountain Home, Comm. Pub. Rds. .....Drum	200	2000			
483	Naches, 22 mi NW of: Ag. FS. TW	650	8000	.303	.0392	.2638
484	Naches, 25 mi NW of: Tieton RS. Ag. FS....TW	500	6000	.303	.0392	.2638
485	Naches, 25 mi W of: Int. Bur. of Reclam. (Tieton Dam) TW	280	900	.308	.0392	.2688
486	Naches, 35 mi NE of: Interior, Bur. Reclam. (Bumping Lake) TW	280	900	.308	.0392	.2688
487	Neah Bay, 70 mi W of Port Angeles, Int. Bur. Ind. Aff. TW	500	1500			
488	Neah Bay, Treas. CG.....Marine	---	8000			
489	Neah Bay, Life- boat Station, Treas. CG...TW	500	2400			

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Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
	WASHINGTON (Cont.)					
490	Nespelem, 2 mi S of: Bureau of Ind. Aff. .... TT	7500	40,000			
491	Newport, RS., Ag., FS. .... TW	500	4000			
492	Newhalem, 20 mi E of: Commerce Pub. Rds. .... Drum	200	2000			
493	North Bend, 1/4 mi E of: Ag. FS. & TW (*1000 gallons into drums)	700	14,000			
494	North Bend, 1/4 mi E of: Ag. FS. Drum	50	150			
495	North Cove, 30 mi SW of Aberdeen, Willapa Bay Life-boat Station, Treas., CG. .... TW	700	4800			
496	Olympia, 4 mi SW of: Int. BPA ..... Drum	500	15,000			
497	Olympia, 2 mi N of: Reserve Fleet, Comm. Maritime Admin. TW	500	4700			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from Posted price	Maximum price Per gallon
WASHINGTON (Cont.)						
498	Omak, City limits of E Omak, Bur. Ind. Aff.....TW	400	2000			
499	Orient, 2 mi N of: RS. Ag. FS.....TW	500	3000			
500	Oroville, Imm. & Nat. Service, BP.....TW	500	6000			
501	Oso, U.S. Naval Radio Station, (T) Jim Creek, TW	2400	28,800			
502	Othello, Columbia Basin Project, Bur. of Reclam. Whse.....TW	1200	40,000			
503	Othello, 8 mi S of: ADC...TW	1000	15,720			
504	Othello, 11 mi S of: Wahluke Camp, Bur. of Reclam.....TW	1000	20,000			
505	Othello, 12 mi NW of: F&WL Refuge.....TW	500	8000			



<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
506	Othello, 13 mi S of: Int. Bureau of Reclam. Wahluke Watermaster Headquarters..TW	800	15,000			
507	Othello, 21 mi NW of: Royal Camp, Int. Bur. of Reclam.....TW	1300	25,000			
508	Packwood, Comm. Pub. Rds.....TW	300	3000			
509	Packwood, Gifford Pinchot NF, Ag. FS.....TW	500	10,500			
510	Packwood, 13 mi N of NPS, Park Entrance....TW	1000+	6000			
511	Pasco, 15 mi NW of: Interior, Bur. of Reclam. .....TW	800	4500			
512	Pasco, Interior, BPA.....TW	750	35,000			
513	Pasco, 6 mi SE of: Int. F&WL .....TW	500	5000			

[fol. 318]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
514	Pomeroy, Ag, FS.....Drum	200	1000			
515	Port Angeles, f.o.b.contractor's marine terminal Treas.CG.Marine --- Posted price date of bid \$_____ Name & location of dock or storage tank_____		5000			
516	Port Angeles, 5 mi N of:CG Air Station, Treas. CG.....TW	500	8800			
517	Port Angeles, 40 mi W of:Snider, RS,Ag.FS....TW	350	8500			
518	Port Angeles, 2 mi S of: Park Hdqts. Interior, NPS.....TW	1000	40,000			
519	Port Angeles, 2 mi S of: Park Hdqts.,Interior NPS.....TW	150	900			

Unleaded Gasoline

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
520	Port Townsend, <u>Regular Gasoline</u> f.o.b. contractor's marine terminal, Treas. CG. Marine ---		35,000			
	Posted price date of bid \$ _____					
	Name & location of dock or storage tank _____					
521	Prosser, 4 1/2 mi NE of: ARS, .TW	1000	5000			
522	Pullman, 1 1/2 mi E of: Ag. SCS. TW	500	3000			
523	Ditto.....Drum	53	106			
524	Queets, Comm. <u>Regular Gasoline</u> Pub. Rds...Drum	200	2000			
525	Quilcene, Comm. Pub. Rds...Drum	200	2000			
526	Quilcene, 2 mi S of: Int. F&W.....TW	500	2000			
527	Quilcene, Ag. FS.....TW	400	9000			
528	Quinault, Olympic NP, Ag. FS.....TW	300	8000			
529						

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
529	Ditto.....Drum	300	4000			
530	Ditto.....TW	300	7000			
531	Quincy, 1 mi S of: Interior, Bur. of Reclam. TW 1000		36,000			
532	Quincy, 9 mi S of: Columbia Basin Project, Interior, Bureau of Reclam. George Watermaster...TW 1400		14,000			
533	Randle, 1 mi from: RS, Ag, FS, TW 300		11,400			
534	Republic, RS Ag. FS.....TW 400		3000			
535	Republic, Comm. Bureau of Public Roads Government- owned T	---	2000			
536	Richland, 2 mi N of: AEC....TT 7000		1,170,000			
	(a) F.O.B. bulk plant. Posted price date of bid \$ .2675			.2675	.0312	.2363
	Location of bulk plant & RR serving it: Pasco, Wn. None					

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
536	(b) F.O.B. activity, transport truck					
	Delivered price date of bid \$ .2406			.2675	.0269	.2406
537	Robe, Comm. Pub.					
	Rds.....Drum 200	2000				
538	Ronald, 3 mi N of: Int. Bureau of Reclam...TW	280	1500			
539	Sappho, Comm.					
	Pub. Rds....Drum 200	2000				
540	Seattle, Santpoint Naval Air Station Interagency Motor Pool, FSS...TW	500+	12,000			
541	Seattle, Federal Office Building, Marion & Western, Interagency Motor Pool, GSA-FSS.TW	800	24,000			
542	Seattle, VA Hospital.....TW	100	300			
543	Seattle, CG Base, Treas, CG.....TW	800	12,000			

<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Amt. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
544	Seattle, Elliott Bay, f.o.b. contractor's marine terminal, Treas. CG.....Marine	---	8000			
	Posted price date of bid \$					
	Name & location of dock or storage tank					
545	Seattle, Lake Union, (Salmon Bay) Treas. CG...Marine	---	3000			
	F.O.B. contractor's terminal. Posted price date of bid \$					
	Name & location of dock or storage tank					
546	Seattle, CG Base, (Drums for trans-shipment to isolated station) in contractor owned drums on loan basis	1000	25,120			



<u>Item No.</u>	<u>Ordering Activity and form of delivery</u>	<u>Average order gallons</u>	<u>Estimated gallons</u>	<u>Posted price on date bid</u>	<u>Ant. to be deduc. from posted price</u>	<u>Maximum price per gallon</u>
WASHINGTON (Cont.)						
547	Seattle, Vehicle Main. Facility, P.O. 3rd South, TT	6000	280,000			
548	Seattle, Vehicle Main. Facility, P.O. Roosevelt Way.....TW	500	84,000			
549	Seattle, 5 mi from: Vehicle Main. Facility, P.O. Pacific Hiway So.....TW	500	45,600			
550	Sequim, Comm. Bur. Pub. Rds. Drum	200	2000			
551	Shelton, 7 1/4 mi N of: Fir Creek GS, Ag. FS.....TW	500	1500			
552	Shelton, 50 mi NW of: Satsop GS, Ag. FS....TW	300	2350			
553	Skykomish, RD, Ag. FS.....TW	350	5000			
554	Snohomish, 1/4 mi NW of: Interior BPA.....TW	400	14,000			

[fol. 324]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
555	Spokane, VA Hospital....TW	200	400	.312	.0412	.2708
556	Spokane, Motor Equipment Division, GSA, FFS, W 514 - 9nd Avenue.....TW	1000	25,000	.307	.0412	.2638
557	Spokane, P.O. Department, Vehicle Main Facility.....TW	3000+	67,300	.307	.0412	.2638
558	Spokane, 8 mi N of: Int., BpA.....TW	1500	50,000	.307	.0412	.2638
559	Sumner, 1½ mi out: Ag. Research. (Pierce County Infirmary)...TW	200	1000			
560	Sunnyside, Roza & M Yard, Bur. of Reclam.....TW	400+	32,000	.303	.0417	.2613
561	Sunnyside, 24 mi N of: Int. BPA.....TW	250	15,000	.303	.0417	.2663
562	Tacoma, Vehicle Service, P.O. Garage.....TW	1000+	115,000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
563	Tacoma, f.o.b. <u>Regular Gasoline</u> contractor's marine terminal into vessels, CG Marine --- 20,000 Posted price date of bid\$ _____ Name & location of dock or storage tanks _____					
564	Tacoma, PHS, Indian T.B. Hospital....TW-GD 500 3000					
565	Tonasket, Ag, FS.....TW 500 14,000					
566	Toppenish, 1 mi W of: Bureau of Indian Affairs, TW 600 28,000 .303 .0417 .2613					
567	Toppenish, 13 1/2 mi S of: Interior, Irrig. Project, Satus No. 3 pump plant.....TW 400 16,000 .303 .0417 .2613					
568	Toppenish, 18 mi W of: White Swan RS. Bur. of Ind. Aff. TW 500 7500 .303 .0417 .2613					

[fol. 326]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
569	Trout Lake, Comm. Pub. Rds. .....Drum	200	2000			
570	Twisp, Okanogan NF, Ag. FS, ....TW	500	18,000			
571	Underwood, 1 mi W of: Interior F&WL, ....TW	500	2500			
572	Vancouver, CG Depot, Treas. CG, ....TW	500	6000			
573	Vancouver, Comm. Pub. Rds, ....TW	750	25,000			
574	Vancouver, VA Hospital (within corporate limits) .....TW	3000	12,000			
575	Vancouver, 2 mi E of: E Whse., Interior, BPA, TW	500	12,000			
576	Vancouver, 2 mi <u>Unleaded Gasoline</u> E of: E whse, Interior, BPA .....Drum	212	1000			
577	Vancouver, 2 mi <u>Regular Gasoline</u> N of: Int. BPA. TW	950	140,000			

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
<u>WASHINGTON (Cont.)</u>						
578	Vancouver, P.O.					
	Vehicle Service, TW 1000		25,200			
579	Vancouver, Shipyard, Maritime					
	Administration, TW 1000		6000			
580	Walla Walla, VA Hospital..TW 1000		6000	.306	.0481	.2579
581	Walla Walla, 1/2 mi NE of:RS, Ag.FS.....TW 500		2400	.306	.0481	.2579
582	Walla Walla, 1 mi W of:Interior, BPA.....TW 500		2500	.306	.0489	.2579
583	Walla Walla 6 mi W of: NPS .....TW-GD 100		200	.316	.0531	.2629
584	Wapato, Wapato Irrig. Proj. E of city limits, Bur.Ind.Aff.TW 1000		84,000			
585	Warden, Field Section(Water-master) Bureau of Reclam. TW 1000		40,000			
						<u>Regular Gasoline</u>
586	Wellpinit 10 mi NW of Ford, Bureau of Indian Affairs TW 800		10,000			

[fol. 328]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
587	Wenatchee, Interior, BPA.....TW	750	50,000			
588	Wenatchee, 16 mi S of:Interior BPA.....TW	400	1600			
589	Westport, Seattle Radio Station, Treas.CG.....TW	300	2200			
590	Westport, 1 mi. NW of:Grays Harbor Lifeboat Station, Treas.,CG...TW	800	3700			
591	White Salmon, 25 mi N of:Gifford Pinchot NF, Ag, FS.....TW	400	9700			
592	White Salmon 32 mi NW of: Mt. Adams RS, Ag. FS.....TW	400	6000			
593	White Salmon, 45 mi N of: Mosquito Lakes GS, Ag. FS.....TW	500	1200			



164  
[fol. 329]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
594	White Salmon, 50 59 mi NW of: Mosquito Lakes GS, Ag. FS....TW	400	1300			
595	White Swan, 31 mi W of: Bureau of Indian Affairs ..... Drum	1000	4000			
596	Winchester, 9 mi W of Ephrata; Watermaster Hdqtrs, Interior, Bur. of Reclam.....TW	1000	12,000			
597	Winthrop, 4 mi. from: Intercity Airport, Ag.. FS.....TW	500	4000			
598	Ditto Drum	50	Unleaded Gasoline 50			
599	Winthrop, Okanogan		Regular Gasoline			
	NP, Ag. FS..TW	500	16,000			
600	Woodland, 33 mi E of: Lewis River RS, Ag. FS...TW	400	6000			
601	Woodland, 44 mi from Pine Creek WorkCenter FS, TW	800	4700			

[fol. 330]

Item No.	Ordering Activity and form of delivery	Average order gallons	Estimated gallons	Posted price on date bid	Amt. to be deduc. from posted price	Maximum price per gallon
WASHINGTON (Cont.)						
602	Wymer, 25 mi S of Ellensburg, FAA.....TW	900	2000			
	<u>Unleaded Gasoline</u>					
603	Yacolt, 10 mi SE of:Sunset RS Ag.FS.....TW	450	6000			
	<u>Regular Gasoline</u>					
604	Yacolt, 15 mi SE of:Sunset RS, Ag.FS.....TW	400	7400			
605	Yakima, GSA, GDM, Whse....TW	100	800	.308	.0412	.2668
606	Yakima, 15 mi N of: Int. Bur. Reclam. ....TW	200+	600	.308	.0412	.2668
607	Yakima, (Within city) Bur. Reclam.....TW	600+	7200	.303	.0412	.2618

[fol. 331]

## TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

(Federal Supply Schedule Contracts)\*

1. **AWARD**—The right is reserved, as the interest of the Government may require, to reject any or all bids and to waive any minor informality or irregularity in bids received. The Government may accept any item or group of items of any bid unless qualified by specific limitation of the bidder. The contract shall be awarded to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to the Government, price and other factors considered. An award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid results in a binding contract without further action by either party.

2. **LABOR INFORMATION**—Attention is invited to the possibility that wage determinations may have been made under the Walsh-Healey Public Contracts Act providing minimum wages for employees engaged in the manufacture for sale to the Government of the supplies covered by this Invitation for Bids. Information in this connection, as well as general information as to the requirements of the act concerning overtime payment, child labor, safety and health provisions, etc. may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington 25, D.C. Requests for information should state the Federal Supply Schedule Class Number, the issuing office and the supplies covered.

3. **DISCOUNTS**—(a) Prompt payment discounts will be included in the evaluation of bids, provided the period of the offered discount is sufficient to permit payment within such period in the regular course of business under the delivery inspection, and payment provisions of the Invitation and Bid.

[fol. 332] (b) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of

origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of those points, or from date correct invoice or voucher (properly certified by the Contractor) is received in the office specified by the Government if the latter date is later than the date of delivery.

4. **PRICES.**—Unit price for each unit bid on shall be shown and such unit price shall include packing unless otherwise specified.

5. **TIME OF DELIVERY.**—Except as otherwise provided in the contract, the articles or services described shall be delivered within the time stated opposite each item or subitem. When no time is stated by the bidder, it is understood and agreed that deliveries will be made within ten (10) days after receipt of the order.

6. **COMPUTATION OF TIME.**—Time, if stated as a number of days, will include Sundays and holidays.

7. **SAMPLES.**—Samples of items, when required, must be submitted within the time specified and at no expense to the Government; if not destroyed by testing, they will be returned at bidder's request and expense, unless otherwise specified in the Schedule.

8. **GOVERNMENT-FURNISHED PROPERTY.**—No material, labor, or facilities will be furnished by the Government unless otherwise provided in the Schedule.

9. **AGENTS.**—Bids signed by an Agent must be accompanied by evidence of his authority.

10. **BIDS.**—(a) Date. Each bidder shall furnish the [fol. 333] information required by the Bid form. The bidder should print or type his name on the front page and on the Bid.

(b) Corrections. Erasures or other changes in bids must be explained or otherwise noted over signature of bidder.

(c) Late. No bid or modification thereof received after the time set for opening will be considered except that when a bid or modification arrives by mail after the time set for

opening, but before award is made, and it is determined by the Government that nonarrival on time was due solely to delay in the mails for which bidder was not responsible, such bid or modification thereof will be considered.

(d) Mistake. Bidders are expected to examine the drawings, specifications, circulars, Schedule, and all instructions pertaining to the supplies or services. Failure to do so will be at the bidder's risk. In case of mistake in extension of price, the unit price will govern.

(e) Alternate. Alternate bids will not be considered unless authorized in the Schedule.

(f) Addressing. Except as provided in (g) below, bids and modifications thereof shall be enclosed in sealed envelopes addressed to the issuing office, with the name and address of the bidder, the date and hour of opening and the Federal Supply Schedule Class number on the face of the envelope.

(g) Telegraphic. Telegraphic bids will not be considered unless authorized in the Schedule, although bids may be modified by telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

(h) Withdrawal. Bids may be withdrawn by written or telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

[fol. 334] 11. BONDS.—No bond or other form of security will be required except as provided in the Schedule.

12. SELLER'S INVOICES.—Invoices shall be prepared and submitted in triplicate unless otherwise specified. Invoices shall contain the following information: Contract number, Order number (if any), and Item number; contract description of supplies or services, sizes, quantities, unit prices, and extended totals. Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading. The following certificate will be shown on each copy of the invoice:

"I certify that the above bill is correct and just and that payment therefor has not been received."



The Contractor or his authorized representative will sign **ONLY** the original (ribbon typed copy, if typed). When the invoice is signed or receipted in the name of a company or corporation, the name as well as the capacity in which he signs, must appear. For example: "John Doe Company, by John Smith, Secretary," "Treasurer," or as the case may be.

13. **NO BID.**—In the event no bid is to be submitted, **DO NOT** return the invitation unless otherwise specified. However, a letter or post card should be sent to the issuing office advising whether future invitations for the type of supplies or services covered by this invitation are desired.

(These Terms and Conditions are the same as those on page 2 of Standard Forms 33 and 30 (Nov. 1949 Edition) except Numbers 1, 2, 5 and 10 (a) and (f) which are modified for Federal Supply Schedule Contracts.)

GSA FORM 281b  
March 1951

[fol. 335]

## GENERAL PROVISIONS FOR FEDERAL SUPPLY SCHEDULE CONTRACTS

(March 1951)

1. **SCOPE OF CONTRACT.** (a) Articles or services will be ordered from time to time in such quantities as may be needed. As it is impossible to determine the precise quantities of different kinds of articles and services described in the contract that will be needed during the contract term, each Contractor whose bid is accepted will be obligated to deliver all articles and services of the kinds contracted for that may be ordered during the contract term, except as set forth in subparagraph (b) below. The statements as to money value of previously reported purchases or estimated quantities are given for information only and shall not relieve the Contractor of his obligation to fill all orders from agencies and activities other than those specified in subparagraph (b) below. The agencies and activities of the United States and the District of Columbia Governments



for the mandatory use of which the contract is made (as specified in the schedule) are under obligation, except in emergencies, to order from the Contractor all articles or services covered by this contract that may, in the judgment of the ordering office, be needed. If the right was reserved, in the invitation for bids, to make multiple awards, it is understood and agreed that in consideration of the valuable benefits, advantages and rights which accrue to Contractor as holders of Federal Supply Schedule contracts, and the expense to which the Government is put in establishing such contracts and distributing resulting Federal Supply Schedules, that Contractors are fully bound to fill all orders as above described.

(b) Where agencies and activities of the United States Government ARE NOT specifically included in the schedule [fol. 336], Contractors may honor orders from such offices on the same basis as those which are specifically included. The Contractor agrees that in the event such an order is not acceptable, he will return it by mailing or delivering it to the ordering office within 10 days after receipt, and that failure so to return the order will constitute acceptance thereof, whereupon all provisions of the contract shall apply with respect to such order to the same extent as though received from an agency or activity specifically included in the contract.

**2. SPECIFICATIONS—(A) Government - Specified Brand Names.** Any reference in the Invitation to manufacturers' brand names and numbers is intended to be descriptive, but not restrictive, and is for the sole purpose of indicating to prospective bidders articles that will be satisfactory. Bids on comparable items offered will be considered, provided the bidder clearly states in his bid the exact article he is offering and how it differs from that specified. Cuts, illustrations and other descriptive matter which will clearly indicate the character of the article covered by the bid and the differences from the referenced brand should be included, if available. In the absence of such information, it is understood that the bidder is offering the item as specified.

(b) **Bidder-Specified Brand Names.** On items for which the invitation for bids specifies quality, design or performance, the insertion of brand names or numbers by the bidder will be understood to mean that the bid is for furnishing the particular brand or number. Such bids must be accompanied by a statement that the article proposed to be furnished complies with the requirements.

(c) **Samples.** When a sample is not called for by the [fol. 337] invitation, strict compliance with the specifications will be required under the contract, without regard to any sample voluntarily submitted by the bidder, unless the bid expressly states to what extent the bidder offers to furnish in accordance with the sample rather than the specifications. Where the bid is not so qualified, such samples will be disregarded. Unless provided otherwise in the Invitation, where submission of samples is required by the Invitation, unless the bidder otherwise indicates, the articles delivered under the contract, in addition to conforming with specifications called for, must conform to or equal the sample submitted.

(d) **Copies of Federal Specifications or other Government specifications referred to are obtainable upon application to the issuing office.**

**3. SAMPLES—**Samples must be furnished as required in the Invitation, and listed in duplicate, on forms enclosed with the invitation, one copy to be retained by the bidder, the other to be packed with the samples. Samples relating to an accepted bid will be retained by the General Services Administration issuing office during the life of the contract. The right is reserved to retain samples for the purpose of testing, and no allowance will be made for such samples. Each sample must be plainly marked with the complete letter and number of the item or subitem to which it relates, together with the name of the bidder. Should samples for more than one class of articles be packed in a single case or package, each class of samples must be placed in a separate compartment, or wrapped together and distinctly marked with the proper class number. Cases or packages containing samples must be plainly marked "Samples" with

the name of the bidder on the upper left-hand corner and [fol. 338] addressed and forwarded to the General Services Administration issuing office. All charges for transportation of samples must be prepaid by the bidder. Bids may be rejected unless samples required in connection therewith are delivered to the General Services Administration issuing office prior to the time set for the opening of bids. Bids must not be enclosed with samples.

4. **PACKING**—(a) Domestic. Unless otherwise provided in the specifications, articles shall be delivered in standard commercial containers so constructed as to insure acceptance by common or other carrier for safe transportation, at the lowest rate, to the point of delivery. Such containers shall remain the property of the ordering office except when the contract provides that containers are to be returned, in which case it is understood that the return thereof shall be at the risk and expense of the Contractor.

(b) Export. Where export packing is not otherwise specifically provided for, such packing may be required in orders for any article, and an equitable adjustment shall be made in the contract price or delivery schedule, or both. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". Request for adjustment must be asserted within 30 days from date of receipt by the Contractor of notification for export packing, or prior to final payment under the order whichever is later, and must be accompanied by a certified and itemized statement of the increased costs for which the adjustment is requested, showing the allowance or deduction therefrom, if any, of the cost of the domestic packing.

5. **MINIMUM ORDER: WEIGHT**.—Unless otherwise indicated, as for example, by packing requirements, lot [fol. 339] sizes, or statement of a minimum order limitation, the unit shown for each item determines the smallest quantity which a Contractor will be required to deliver or an agency required to order. Where the unit shown is a measure of weight, such weight is understood to be net unless otherwise stated.

**6. CATALOG: PRICE LISTS**—When a bid is based on the prices contained in a catalog or price list, three copies must be forwarded with the bid, and each must be clearly marked to indicate the item numbers and pages bid upon. Reference to a catalog or price list submitted with a previous year's bid will not be accepted. In case an award is made on an item for which a catalog or price list is submitted, the number of copies of the catalog or price list specified in the schedule, in such form as is approved by the Contracting Officer, will be required promptly upon notice of award. It is understood and agreed that if the Contractor fails to furnish the required catalogs or price lists within fifteen (15) days, the same may be printed by the Government at the Contractor's expense. If terms of sale appearing in any catalog or price list on which a bid is based are in conflict with the terms of this invitation, the latter shall govern.

**7. TRADE DISCOUNTS**—Trade discounts, when quoted, should be reduced to a single percentage; for example, instead of 50, 10, and 5 percent, the discount should be stated as 57¼%.

**8. OFFER OF FORMER GOVERNMENT PROPERTY**.—There is no law against selling back to the Government former Government surplus property, but the Government wants to know if it is buying such surplus. Accordingly, in signing the bid, the bidder warrants, to the best of his knowledge, information and belief, that, except as [fol. 340] otherwise expressly stated in the bid, none of the items or their components covered by the bid have been or will be acquired either directly or indirectly from any activity or agency of the United States Government or from any Government-owned corporation. In addition to any other rights the Government may have at law or under this contract, breach of this warranty shall give the Government the right to terminate the right of the Contractor to proceed with any or all further deliveries under the contract pursuant to the provisions hereof entitled "Default."

**9. ORAL MODIFICATION**.—No oral statement of any person shall be allowed in any manner to modify or otherwise affect the terms of the invitation for bids, schedules, specifications, or contracts.

10. **VARIANCE IN QUANTITY.**—Unless otherwise specified, any variation in the quantities called for in an order, not exceeding 10 percent, will be accepted, when caused by conditions of loading, shipping, packing, or allowance in manufacturing processes.

11. **PAYMENTS.**—The Contractor shall be paid by the ordering office, upon submission of properly certified invoices or vouchers, the prices stipulated herein for articles or services delivered and accepted, less deductions, if any, as provided.

12. **ASSIGNMENT OF PAYMENTS.**—In order to prevent confusion and delay in making payment, no claim or claims for all moneys due or to become due under this contract shall be assigned by the Contractor; but it shall be permissible for the Contractor to assign separately to a bank, trust company, or other financing institution, including any Federal lending agency, in accordance with the provisions of the Assignment of Claims Act of 1940 (54 [fol. 341] Stat. 1029; 31 U.S.C. 203, 41 U.S.C. 15) all moneys due or to become due under any particular purchase order amounting to \$1,000 or more issued by any Government activity or agency under the contract. Any such assignment shall be effective only if and when the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with the officer issuing such purchase order, in addition to complying with the filing requirements set forth in paragraph 4 of the proviso in said Act.

13. **PRICE REDUCTIONS.**—If at any time after the date of the bid, the Contractor reduces the comparable price of any article or service covered by the contract to customers other than the Federal Government, the price to the Government for such article or service shall be reduced proportionately. Such reduction shall be effective at the same time and in the same manner as the reduction in the price to customers other than the Government. The Contractor shall invoice the ordering offices at such reduced prices, indicating on the invoice that the reduction is pursuant to the "Price Reductions" article of the General Provisions. The



Contractor shall furnish promptly to the General Services Administration issuing office complete information as to such reductions.

14. ADVERTISING OF AWARD.—Successful bidders shall not use awards as a basis for commercial advertising.

15. PATENTS.—The Contractor shall hold and save the Government, its officers, agents, and employees, harmless from liability of any kind, including costs and expenses, on account of any patented or unpatented invention, article, device, or appliance manufactured or used in the performance of the contract, including use by the Government.

[fol. 342] 16. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT. (a) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, such claim of patent infringement based on the performance of this contract and asserted against it, or against any of its subcontractors if it has notice thereof.

(b) In the event of litigation against the Government on account of any claim of infringement arising out of the performance of this contract or out of the use of any supplies furnished or construction work performed hereunder, the Contractor agrees that it will furnish to the Government, upon request, all evidence and information in its possession pertaining to the defense of such litigation. Such information shall be furnished at the expense of the Contractor.

17. INSPECTION.—Except to the extent otherwise provided in this contract, the following inspection provisions shall apply: (a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to final acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity



with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or corrected in place, as requested by the Contracting Officer [fol. 343] or ordering office by and at the expense of the Contractor promptly after notice, and shall not again be tendered for acceptance unless the former tender and either the rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies, when requested by the Contracting Officer or ordering office, and to proceed promptly with the replacement or correction thereof, the Government, either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor elects to correct or replace the supplies which the Government has a right to reject and is able to make such correction or replacement within the required delivery schedule, the Contracting Officer or ordering office may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government: Provided, That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All in-

[fol. 344] spections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor. Final acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud or such gross mistakes as amount to fraud.

18. RESPONSIBILITY FOR SUPPLIES.—Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection, and (ii) the Contractor shall bear all risks as to rejected supplies after notice of rejection.

19. FEDERAL, STATE, AND LOCAL TAXES.—(a) Definitions. As used throughout this clause, the following terms shall have the meanings set forth below:

(i) The term "direct tax" means any tax or duty directly applicable to the completed supplies or services [fol. 345] covered by this contract, or any other tax or duty from which the Contractor or this transaction is exempt. It includes any tax or duty directly applicable to the importation, production, processing, manufacture, construction, sale, or use of such supplies or

services; it also includes any tax levied on, with respect to, or measured by sales, receipts from sales, of use of the supplies or services covered by this contract. The term does not include transportation taxes, unemployment compensation taxes, social security taxes, income taxes, excess-profits taxes, capital stock taxes, property taxes, and such other taxes as are not within the definition of the term "direct tax" as set forth above in this paragraph.

(ii) The term "contract date" means the effective date of this contract if it is a negotiated contract, or the date set for the opening of bids if it is a contract entered into as a result of formal advertising.

(b) Federal Taxes. Except as may be otherwise provided in this contract, the contract price includes all applicable Federal Taxes in effect on the contract date.

(c) State or Local Taxes.—Except as may be otherwise provided in this contract, the contract price does not include any State or local direct tax in effect on the contract date.

(d) Evidence of Exemption.—The Government agrees, upon request of the Contractor, to furnish a tax-exemption [fol. 345] certificate or other similar evidence of exemption with respect to any direct tax not included in the contract price pursuant to this clause; and the Contractor agrees, in the event of the refusal of the applicable taxing authority to accept such evidence of exemption, (i) promptly to notify the Contracting Officer of such refusal, (ii) to cause the tax in question to be paid in such manner as to preserve all rights to refund thereof, and (iii) if so directed by the Contracting Officer, to take all necessary action, in cooperation with and for the benefit of the Government, to secure a refund of such tax (in which event the Government agrees to reimburse the Contractor for any and all reasonable expenses incurred at its direction).

(e) Price Adjustment.—If, after the contract date, the Federal Government or any State or local government either (i) imposes or increases (or removes an exemption with respect to) any direct tax, or any tax directly applicable to the materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, or (ii) refuses to accept the evidence of exemption, furnished under paragraph (d) hereof, with respect to any direct tax excluded from the contract price, and if under either (i) or (ii) the Contractor is obliged to and does pay or bear the burden of any such tax (and does not secure a refund thereof); the contract price shall be correspondingly increased. If, after the contract date, the Contractor is relieved in whole or in part from the payment or the burden of any direct tax included in the contract price, or any tax directly applicable to the materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, the Contractor agrees promptly to notify the Contracting Officer of such relief, and the contract price [fol. 347] shall be correspondingly decreased or the amount of such relief paid over to the Government. Invoices or vouchers covering any increase or decrease in contract price pursuant to the provisions of this paragraph shall state the amount thereof, as a separate added or deducted item, and shall identify the particular tax imposed, increased, eliminated, or decreased.

(f) Refund or Drawback.—If any tax or duty has been included in the contract price or the price as adjusted under paragraph (e) of this clause, and if the Contractor is entitled to a refund or drawback by reason of the export or re-export of supplies covered by this contract, or of materials or components used in the manufacture or furnishing of the completed supplies or services covered by this contract, the Contractor agrees that he will promptly notify the Contracting Officer thereof and that the amount of any such refund or drawback obtained will be paid over to the Government or credited against amounts due from

the Government under this contract; Provided, however, That the Contractor shall not be required to apply for such refund or drawback unless so requested by the Contracting Officer.

**20. FEDERAL EXCISE TAXES—D.C. GOVERNMENT.**—No Federal excise tax under chapter 19 (Retailers excise taxes) or chapter 29 (Manufacturers' excise taxes) of the Internal Revenue Code (Sections 2406 and 3442 of Title 26, United States Code) is imposed with respect to the sale of any article to the District of Columbia. Contractors will bill shipments to the District of Columbia Government at prices exclusive of such excise tax, and show the amount of such tax on the invoice. The Government of the District of Columbia will furnish tax-exemption certificates in connection with any items purchased [fol. 348] which are otherwise subject to such Federal excise tax.

**21. DEFAULT.**—(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:—

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of



causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

[fol. 349] (c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services. Provided, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plants, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Con-



tracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

[fol. 350] (e) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(f) When the Contracting Officer has terminated the right of a Contractor to proceed with all further deliveries, thereafter Government agencies and activities for the mandatory use of which the contract was made may purchase the articles or services covered by the termination without furnishing the defaulting contractor orders therefor, and any excess cost over the original contract price which is not excusable under subparagraph (b) above shall be charged to the defaulting contractor and his sureties (if any).

(g) Any ordering office may, in respect to any one or more purchase orders placed by it under the contract, exercise the same right of termination, acceptance of inferior articles or services, and assessment of excess cost as might the Contracting Officer, except that when failure to deliver articles or services is alleged by the Contractor to be excusable, the determination of whether the failure is excusable shall be made only by the Contracting Officer of the General Services Administration, to whom such allegation shall be referred by the ordering office and from whose determination appeal may be taken as above provided.

22. DISPUTES.—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement between the ordering office and the Contractor shall be decided by the Contracting Officer of the General Services Administration issuing office who shall reduce his decision.

to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Administrator of General Services and the decision of the Administrator of General Services or his duly authorized representative for the hearing of such appeals shall be final and conclusive: Provided, That if no such appeal is taken, the decision of the Contracting Officer of the General Services Administration issuing office shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

23. BUY AMERICAN ACT.—The Contractor agrees that there will be delivered under this contract only such unmanufactured articles, materials, and supplies (which term "articles, materials, and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U.S. Code 10a-c), the foregoing provision shall not apply (i) with respect to supplies excepted by the Administrator of General Services from the application of that Act, (ii) with respect to supplies for use outside the United States, (iii) with respect to the supplies to be delivered under this contract which are of a class or kind determined by the Administrator of General Services or his duly authorized representative not to be mined, produced, or manufactured, as the case may [fol. 352] be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be delivered under this contract are man-

ufactured, as are of a class or kind determined by the Administrator of General Services or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit delivery of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

24. **CONVICT LABOR.**—In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

25. **EIGHT-HOUR LAW OF 1912.**—This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U.S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U.S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in [fol. 353] accordance with the provisions of this clause. The wages of every such laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each

violation of the requirements of this clause a penalty of five dollars shall be imposed upon the Contractor for each such laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause; and all penalties thus imposed shall be withheld for the use and benefit of the Government.

**26. WALSH-HEALEY PUBLIC CONTRACTS ACT.**

—If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being [fol. 354] subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

**27. NONDISCRIMINATION IN EMPLOYMENT.**—In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

**28. OFFICIALS NOT TO BENEFIT.**—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

**29. COVENANT AGAINST CONTINGENT FEES.**—The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this

contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

30. DEFINITIONS.—As used throughout this contract, the following terms shall have the meanings set forth below:

[fol. 355] (a) The term "Administrator of General Services" means the Administrator of General Services or the Deputy Administrator of General Services; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Administrator.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

GPO—O—GSA 334  
GSA Form 28ic  
March 1951



[fol. 356] (Retain for Future Use)

**SPECIAL PROVISIONS FOR BULK AND DRUM  
DELIVERIES OF GASOLINE, FUEL OILS,  
AND SOLVENTS**

**MARCH 1, 1951**

1. **APPLICABILITY.** These Special Provisions are applicable to bulk deliveries of gasoline, burner oil, diesel fuel, kerosene (Class 7), and solvents (Class 51) under **FEDERAL SUPPLY SCHEDULE** contracts.

2. **DEFINITIONS.** As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "liquid fuel" means gasoline, burner oil, diesel fuel, kerosene (Class 7 of the Federal Supply Schedule), and for the purpose of these Special Provisions includes solvents (Class 51 of the Federal Supply Schedule).

(b) The term "bulk plant" means a bulk station, refinery, tank farm, marine terminal or station or any other source of supply or storage from which bulk deliveries are made.

(c) The term "bulk deliveries" means deliveries accomplished by means of drums, tank wagons, transport trucks or tank cars and deliveries from marine terminals or stations.

(d) The term "ordering activity" means any Government organizational unit, facility or other establishment authorized to purchase under the contract.

(e) The term "gallon" means the U.S. gallon of 231 cubic inches.

(f) The term "estimated gallonage" means the estimated quantity indicated in items of the Schedule deemed necessary to meet the estimated requirement of the Government.



(g) The term "Schedule" means the Schedule of the Invitation for Bids and the contract(s) resulting therefrom.

(h) The term "Zone" as used herein and in the Schedule means one or more designated counties within an indicated State.

(i) The term "General Provisions" means the General Provisions for Federal Supply Schedule Contracts (Revised March 1951).

3. **GRADES—SPECIFICATIONS.** The kind and grade of liquid fuel and the applicable Federal or departmental specification, table, bulletin, or other document or provision necessary for an understanding of the Invitation for Bids, are set forth in the Schedule and are a part of the contract. Liquid fuel furnished under any item of the contract may be a product regularly refined and commercially distributed for public use in the immediate locality where delivery under this contract shall be made; provided, that such product meets the applicable specification requirements for the designated grade. If a State or local law or regulation prohibits the use or sale of a particular liquid fuel which complies with the prescribed specification so modified as to comply with the applicable State or local law or regulation may be substituted; provided, that such modified product will serve the intended purpose. If the Government determines that the modified product is not suitable for the intended use, the Government will not be obligated to accept or the contractor to deliver such modified product.

[fol. 358] 4. **OBLIGATED GALLONAGE.** Unless otherwise provided in the Schedule, the contractor shall be obligated to deliver up to 125 percent of the estimated gallonage specified in each item of the Schedule.

5. **ADDITIONAL AGENCIES AND ADDITIONAL GALLONAGE.** Additional Federal agencies, additional activities, additional delivery points and additional gallonage may be added to the contract by mutual agreement in the form of an amendment or supplement. Such additional gal-

lonage shall be furnished at a price not to exceed the contract price. Such amendment or supplement shall be subject to all the terms, conditions and provisions of the contract.

6. POSTED PRICES—GENERAL. Posted prices shall be those used in computing the prices customarily charged to commercial purchasers in transactions of the same kind, i.e., commercial sales in each geographical area where tank wagon or drum deliveries are made, at each bulk plant from which tank car or transport truck shipments are made, and at each marine terminal or station from which marine deliveries are made, before the addition of Federal, state or local taxes. These prices shall be publicly posted, (except at common carrier pipe-line terminals where prices are not publicly posted) or made available for examination at the bulk plant from which delivery is made, also at the contractor's headquarters (the contract address) unless other addresses are indicated.

(a) *Tank Car and Transport Truck Shipments.* If the contractor does not operate his own bulk plant, either alone or in cooperation with others, the contractor's bulk plant posted prices shall not exceed the posted [fol. 359] prices of the marketing company from which contractor makes shipments or deliveries under this contract.

(b) *Tank Wagon and Drum Deliveries.* Any contractor who does not in general distribute liquid fuel in the geographical location for which he has received a tank wagon or drum delivery award, but who establishes posted prices for that location only in order to comply with the contract requirements, shall have said posted prices subject to comparison with the posted prices of others who do in general commercially operate in that area; and if it be found that the contractor's posted price at time of delivery exceeds the price for a like grade of liquid fuel for the same form of delivery to the same locality, as posted by two or more of said "Others," then the contractor's posted price shall be subject to correction to equal the average of the applicable prices posted by said "Others."

**7. EVALUATION OF BIDS.** Unless otherwise provided in the Schedule the Government will, at its sole option, evaluate the bids for each item on the basis of either (1) (a) posted price or delivered price, as the case may be, when requested in the Schedule, and/or (b) amount to be deducted from posted price or (2) maximum price, whichever basis the contracting officer determines will be most advantageous to the Government, taking into consideration transportation costs, when appropriate, market trends, and other factors. Bid prices shall include all applicable Federal Taxes, and will be evaluated as including all State and Local Taxes imposed prior to the date set for opening bids except those [fol. 360] shown to be excluded from bid prices in the spaces provided in the Schedule or otherwise stated by bidder. Unless specifically required by the Schedule, bidders are not required to specify maximum prices in the spaces provided, but should the Government elect to evaluate the bids for any item on the basis of maximum prices, any bid which does not specify a maximum price for such item will be disregarded. For purposes of evaluation only, the Government at its option may disregard fractions of a cent extended in bids to more than four places beyond the decimal point, even though tie bids result. The contract for each item will be awarded on the basis of the Government's evaluation of bids to that responsible bidder whose bid for any item, conforming to the Invitation for Bids, will be most advantageous to the Government, prices and other factors considered.

**8. PRICES.** The contract price shall include or exclude, as the case may be, certain taxes as provided in Clause 19, General Provisions, entitled "Federal, State and Local Taxes and Clause 20, General Provisions, entitled "Federal Excise Taxes—D.C. Government." The unit price for each item of the contract, whether f.o.b. point of origin or f.o.b. destination, shall increase or decrease in direct proportion to any increase or decrease in the applicable posted price. Example: Contractor maintains bulk plant posted prices. Assuming that the contractor does not customarily maintain posted prices f.o.b. destination for deliveries by tank cars or transport trucks, the "applicable posted price" for use in

ascertaining a proper *increase or decrease* in the f.o.b. destination unit price would be the increase or decrease in contractor's f.o.b. bulk plant posted price for the same kind and grade of liquid fuel. In no event shall the price exceed [fol. 361] the maximum price, if any.

9. **INVOICES.** Invoices shall be prepared and submitted as required by clause 12, Terms and Conditions of the Invitation for Bids, entitled "Seller's Invoices." The following additional information also shall be shown and identified by item number on each invoice:

Posted price and deductible amount, if any; the maximum price, if any; State and local taxes (identified), either included in or excluded from the price (state which). With respect to tank car and transport truck deliveries priced f.o.b. destination, also show on the voucher the transportation costs.

10. **PURCHASE ORDERS.** Each activity will place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which are to be made at Government expense. Purchase orders will designate the kind and grade of liquid fuel to be furnished under the particular item, will state the quantity desired, the place of delivery, the time or date for delivery, and will include any special instructions deemed advisable by the ordering activity. Orders will be limited to actual requirements. In the event an activity covered by the contract is deactivated or closed, or equipment is changed for the use of a different kind or type of liquid fuel, the Government may, by written notice to contractor, cancel any item or items involved, in whole or in part, or cancel any unfilled purchase orders.

11. **SAFETY LAWS AND REGULATIONS.** All deliveries shall be made in strict accordance with applicable laws, ordinances, or regulations, and the latest approved safety [fol. 362] practices. The contractor shall refuse to make delivery when an order, if accomplished as provided in the order or the contract, would violate any applicable law, ordinance, regulation or approved safety practice, and shall advise the ordering activity accordingly. Notwith-

standing any provision in the contract to the contrary, such refusal shall not constitute a default within the meaning of clause 21, General Provisions, entitled "Default." The contractor is requested to report any such occurrence to the contracting officer at the address shown on the Invitation for Bids and furnish complete information regarding the order, including the name and address of the ordering activity, contract number, item number, the designated type of delivery, the quantity and grade of the liquid fuel ordered, together with a complete citation of law, ordinance, regulation, or approved safety practice which would be violated if the delivery had been accomplished as provided herein or as directed by the purchase order. The contractor shall recommend to the contracting officer ways and means for the lawful and safe delivery of the required liquid fuel, furnishing a copy of such recommendation to the ordering activity. Any delivery made or attempt to be made by the contractor in violation of an applicable law, ordinance, regulation, or approved safety practice, shall be the sole responsibility of the contractor.

12. **DELIVERY TIME.** The time necessary for an order to reach the contractor in due course of mail will be taken into consideration by the ordering activity in connection with its request for the delivery of liquid fuel under this contract, and as much time as possible will be allowed for making the delivery. In the absence of specific instructions in the purchase order; the following limitations, except [fol. 363] clusive of non-work days, shall apply:

(a) *Tank Wagon and Drum Deliveries* shall be accomplished within 48 hours after receipt of the order. The Government shall not be charged for any waiting time in making tank wagon or drum deliveries f.o.b. destination;

(b) *Transport Truck Deliveries* shall be started within 48 hours after receipt of the order. When the ordered quantity exceeds the carrying capacity of the equipment making the delivery, thereby necessitating multiple deliveries for the accomplishment of the order, the contractor shall make not less than one completed



delivery per day, Sundays and non-work days excepted, until the order has been accomplished. Unless the bidder shall indicate in the Schedule a free period for the unloading of transport trucks and a rate for lost time thereafter, the Government shall not be charged for any portion of the time consumed in making such deliveries. The free period for unloading transport trucks shall commence at the time of arrival at destination. In connection with transport truck deliveries the Government shall not be charged with lost time due to causes beyond the control and without the fault or negligence of the Government.

(c) *Tank Cars* shall be released to a common carrier within 48 hours after receipt of the order.

(d) *Deliveries to Vessels* from or at marine terminals or stations shall be accomplished within 24 hours after receipt of the order.

[fol. 364] 13. **TANK WAGON AND DRUM DELIVERIES** shall be accomplished at contractor's expense either by tank wagon into the storage tanks of the ordering activity or in drums as specified in the contract or purchase order; provided, that if any such delivery would violate any law, ordinance or regulation it shall be accomplished by lawful means as provided in paragraph 11 hereof, entitled "Safety Laws and Regulations." Zone deliveries in cities shall be made by tank wagons. Notwithstanding any implication in the contract to the contrary, the contractor is not required to deliver zone items to points where the use of boats is required to accomplish delivery or to points not safely and reasonably accessible by motor vehicles over public or Government maintained roads.

14. **CONTRACTOR'S DRUMS** shall conform to applicable specification requirements prescribed by the Interstate Commerce Commission. Drums emptied within the allowed free period will be returned to the site or location where they were received, and the contractor will be notified that they are available for pickup. Unless the bidder shall indicate in the Schedule information relating to free period



for retention of contractor's drums, deposit per drum required for over-time retention, period allowed for return after deposit, and refund after return of drum to contractor, the Government shall not be charged for any portion of the time contractor's drums are retained and shall not be held liable or accountable for the return of the drums.

15. TANK CAR AND TRANSPORT TRUCK DELIVERIES. Prices f.o.b. bulk plant shall include loading either railway tank cars or transport trucks. The Government shall have the right to designate the kind or type of transportation to be used. Government-owned tank cars shall be used when so directed by the ordering activity. Prices f.o.b. [fol. 365] destination by transport truck shall include unloading into storage tanks at destination. Commercially owned and operated equipment shall be selected for carrying capacity to accommodate as near as practicable the gallonage specified in the purchase order. The ordering activity shall, when pertinent, specify in its order the gross weight permitted on trestles, bridges, or roads within or especially constructed to serve the activity. It shall be the responsibility of the contractor to ascertain and be governed by the gross weight, or other limitations, imposed on users of State highways, local roads or streets, or on railway freight shipments, including weight limitations relating to bridges and trestles.

16. DELIVERY TO VESSELS. Unless otherwise provided in the Bid, the maximum price quoted on a zone item shall apply to deliveries from contractor's marine terminals or service stations within the zone. Deliveries into the storage tanks aboard vessels shall be accomplished through tight fitting connections to prevent leakage or dripping at joints, and otherwise shall be made in accordance with the latest approved methods, including safety measures to prevent fire hazards arising from electric or other sparks. When appropriate, metal ground connections shall be maintained between the filling hose nozzle and the receiving tank. Ground connections shall be positively attached to the hose nozzle and fitted with an approved type ground clip for connection to the ground screws mounted on and

constituting a part of the vessel. Ground connections of the friction-surface-contact type, such as chains or flexible links and rings, are not sufficient and are prohibited.

17. **ACCESSORY DELIVERY EQUIPMENT.** Pumps and necessary sections of hose required for the satisfactory [fol. 366] accomplishment of a delivery shall be furnished by the contractor without extra cost to the Government.

18. **DELIVERY TICKETS.** Each delivery shall be accompanied by a dated delivery ticket showing all necessary data, including the contract number and item number, kind, grade and quantity of the liquid fuel being delivered, and the address of the bulk plant furnishing delivery. Transport truck and tank car delivery tickets also shall show the temperature of the liquid fuel at the time of loading, and for tank car shipments the outage in the dome or shell after filling. Delivery tickets for shipments in other than Government-owned tank cars shall show the capacity of each car when the shell is full, the number of gallons per inch of height in the dome, and the number of gallons for each of the first four inches out-of-shell.

19. **QUANTITY DETERMINATIONS.** Temperature-volume corrections, when required by the contract or by the ordering activity, shall be made in accordance with "Supplement to NBS Circular C410, issued April 10, 1937." When temperature-volume corrections are required, the volume shall be corrected to 60 degrees Fahrenheit. The quantity of liquid fuel delivered to the ordering activity on each order shall be determined as follows:

(a) *Tank Wagon and Drum Deliveries.* Unless otherwise specified in the Schedule, minimum deliveries by tank wagons shall be 100 gallons, and deliveries in drum (full) shall approximate 50 to 55 gallons. Approved meter or other acceptable measuring devices or procedures, which accurately indicate, register, or determine the gallonage being furnished, shall be used when available. In the absence of approved meter or measuring devices, the contractor and the ordering activity [fol. 367] shall agree prior to delivery as to the

method of determining the gallonage delivered. Such agreements and determinations shall be made by authorized representatives of the ordering activity and the contractor acting jointly. Temperature-volume corrections are not required for tank wagon or drum deliveries except when heated to a temperature as directed by the ordering activity or to obtain fluidity to facilitate transfer.

(b) *Tank Car and Transport Truck Shipments.* Unless otherwise specified in the Schedule, minimum deliveries by tank cars and transport trucks shall be the full capacity of the vehicle. The gallonage shall be determined as of the time of loading, with the volume corrected to 60° Fahrenheit. Tank cars received showing more than four inches out-of-shell shall be gauged. If commercial equipment is used the contractor shall furnish the ordering activity with all date and information pertinent to the determination of gallonage delivered. If a Government-owned tank car is used, the gallonage will be determined from Government records relating to such car.

20. **SLUDGE.** If a tank wagon, transport truck, tank car or drum used in making delivery contains sludge, dirty or unsuitable oil, water or precipitated solids, the ordering activity may reject such delivery. If sludge or other unsuitable materials are contained in a tank car and there is sufficient free time prior to the commencement of demurrage or other costs for the satisfactory separation of such sludge or foreign matter from the liquid fuel ordered, the car may be unloaded and proper deduction made from the volume of the liquid fuel, to the end that the total quantity of usable liquid fuel received may be determined. Tank cars containing sludge or other foreign matter not separable from the ordered liquid fuel within the free unloading period may, at the sole discretion of the ordering activity, be rejected or with the consent of the contractor be allowed to stand, before unloading, a sufficient time for satisfactory separation. If allowed to stand beyond the free unloading period with the consent

of the contractor, he shall pay all demurrage or other costs assessed against the car, whether or not unloaded at the activity. In any event, and regardless of the kind of equipment used in transportation, payment will be made pursuant to the provisions of the contract only for the quantity of liquid fuel delivered in conformity with the purchase order.

21. **CONTRACTOR'S ANALYSIS REPORT.** An analysis report, setting forth results from the various test factors enumerated in the applicable specification, shall be procured in duplicate by and at the expense of the contractor for each tank car and each transport truck shipment, and for each marine delivery of 1,000 gallons or more. The original copy of such report shall be forwarded to the ordering activity.

22. **TESTING BY GOVERNMENT.** The ordering activity shall have the right to take samples of liquid fuel for test purposes from tank car and transport truck shipments, and from marine deliveries of 1,000 gallons or more, and also from any other deliveries whenever deemed necessary for the protection of the Government, which samples will be drawn by the ordering activity in accordance with the latest approved practice and tested at the National Bureau of Standards, or at such other laboratory as may be selected by the ordering activity. Should the analysis report show that the liquid fuel does not comply with the applicable specification, the cost of such test shall be borne by the contractor; otherwise, such cost, if any, shall be borne by the ordering activity. Except as otherwise provided herein, the reported findings for each tested sample drawn by the contractor or by the Government will be considered as representing only that delivery from which the sample was taken.

23. **SUBSTANDARD DELIVERIES.**

(a) When a report on a tested sample shows that the liquid fuel shipped or delivered does not comply with the contract requirements, the Government may, at its option, proceed as follows:

(1) The ordering activity may reject the whole or any part of the substandard liquid fuel which has not been consumed or mixed with other products, and require the contractor forthwith to remove the whole or such part of the substandard liquid fuel as has not been consumed or mixed with other products, and require the contractor forthwith to remove the whole or such part of the substandard liquid fuel as has not been consumed or mixed with other products, and replace it, without cost to the Government, with an equal quantity of liquid fuel which complies with the contract requirements; or

(2) The ordering activity may accept the sub-[fol. 370] standard quality product at a proper reduction in price. The ordering activity may request advice as to the proper reduction in price from the office of General Services Administration shown on page one (1) of the Invitation for Bids. Should the ordering activity and the contractor fail to agree as to whether the product does or does not comply with contract requirements or fail to agree as to the proper reduction in price, such disagreement shall constitute a dispute concerning a question of fact arising under the contract and shall be disposed of pursuant to clause 22, General Provisions, entitled "Disputes;"

(b) When reports on tested samples from two or more shipments or deliveries of the same kind and grade of liquid fuel show that the product does not comply with the contract requirements, the contracting officer may, regardless of the action taken by the ordering activity under paragraph (a)(1) or (a)(2) hereof, determine the contractor to be in default or the contract as a whole or with respect to any item under which the contractor has made two or more substandard shipments or deliveries, and may terminate the contract as a whole or with respect to any such item pursuant to the provisions of clause 21, General Provisions, entitled "Default."



## [fol. 371] 24. DEFAULT.

(a) An ordering activity may, subject to the provisions of paragraph (b) of clause 21, General provisions, entitled "Default," by written Notice of Default to the contractor, terminate the right of the contractor to proceed with the delivery of liquid fuel required by a purchase order issued by such ordering activity under any item of the contract as to which the contractor has failed or refused to make delivery within the time specified or any extension thereof authorized by the ordering activity.

(b) In the event the ordering activity exercises the right to cancel a purchase order as provided in paragraph (a) hereof, the ordering activity may procure, upon such terms and in such manner as the ordering activity may deem appropriate, similar liquid fuel, and the contractor shall be liable to the Government for any excess costs for such similar liquid fuel; Provided, That the contractor shall not be liable for any excess costs if any failure to perform the contract arises out of the causes specified in paragraph (b) of Clause 21, General Provisions, entitled "Default." The contractor shall continue the performance of this contract to the extent not terminated by the ordering activity under the provisions of paragraph (a) hereof.

(c) Paragraphs (a) and (b) hereof shall not affect the authority of Government officials to exercise any [fol. 372] right or authority reserved to or vested in the Government or Government official by Clause 21, General Provisions, entitled "Default."



[fol. 373]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT—  
Filed February 17, 1961 :

Comes Now, The Plaintiff, Utah Oil Refining Company, a corporation, and moves this Honorable Court for Summary Judgment herein under the provisions of Rule 56 of the Idaho Rules of Civil Procedure, and respectfully shows the Court that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment as a matter of law.

This motion is made and based upon the notice of motion hereinafter set forth, and upon the pleadings, papers, records, and files in this action, and upon the affidavits of Harold R. Belles, W. L. Olsen and K. W. Grundmeyer filed herewith.

That there has been served and filed herewith, pursuant to Rule XII of the Local Rules of Practice for the District Courts of the Third Judicial District of the State of Idaho, proposed Findings of Fact and Conclusions of Law, and proposed Summary Judgment.

Dated This 16th day of February, 1961.

Calvin Dworshak, 326 Bank of Idaho Building, Boise,  
Idaho, Attorney for Plaintiff.

Notice of Motion

To the Defendant, P. G. Neill, as Tax Collector of the State of Idaho, and to His Attorneys of Record, Frank L. Benson, Esquire, Attorney General of the State of Idaho, and Robert E. Bakes, Esquire, Assistant Attorney General of the State of Idaho:

You, and Each of You, Will Please Take Notice That on [fol. 374] Friday, the 3rd day of March, 1961, at the hour

of 10:00 o'clock in the forenoon of said day, or as soon thereafter as Counsel can be heard, at the courtroom of the above entitled Court in the Ada County Court House in Boise City, County of Ada, State of Idaho, Plaintiff will bring the above and foregoing Motion of Plaintiff for Summary Judgment on for hearing.

Dated This 16th day of February, 1961.

Calvin Dworshak, Boise, Idaho, Attorney for Plaintiff.

Service of the following pleadings in the above captioned case, to-wit: Motion of Plaintiff for Summary Judgment, Notice of Motion, Affidavit of Harold R. Belles, Affidavit of W. L. Olsen, Affidavit of K. W. Grundmeyer, Plaintiff's Proposed Findings of Fact and Conclusions of Law and Plaintiff's Proposed Summary Judgment are hereby acknowledged and receipt of copies thereof accepted this 17th day of February, 1961.

Frank L. Benson, Attorney General of the State of Idaho,  
By Robert E. Bakes, Assistant Attorney General of Idaho,  
Residing at Boise, Idaho, Attorneys for Defendant.

[fol. 381]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF P. G. NEILL, TAX COLLECTOR OF THE  
STATE OF IDAHO—Filed March 9, 1961

\*\*\*\*\*

State of Idaho,  
County of Ada, ss.

P. G. Neill, Tax Collector of the State of Idaho, being first duly sworn, deposes and says:

That he makes this affidavit in support of defendant's motion to dismiss plaintiff's motion for summary judgment and further he makes said affidavit in opposition to plaintiff's motion for summary judgment.

That the above-entitled action was commenced to recover motor fuels tax paid by the plaintiff pursuant to Chapter 12, Title 47, Idaho Code, upon gasoline imported into the State of Idaho. This gasoline was consumed in the State of Idaho by Phillips Petroleum Company, a corporation, in the furtherance of said Phillips Petroleum Company's management contract with the Atomic Energy Commission of the United States Government; that said Phillips Petroleum Company, as management contractor for the Atomic Energy Commission, operates certain motor vehicles over the highways of the State of Idaho for the purpose of transporting employees of various private corporations to their places of employment upon the National Reactor Testing Station site near Arco, Idaho; that approximately 60% of the gasoline referred to in plaintiff's complaint was consumed in propelling said vehicles over highways owned and maintained by the State of Idaho; that Phillips Petroleum Company charges a fee for the transportation of some of said employees to their place of employment at the National Reactor Testing Station site; that said gasoline is delivered into the custody of [fol. 382] Phillips Petroleum Company at Idaho Falls, Idaho, and is there introduced into the various vehicles by employees of Phillips Petroleum Company; that in an express effort to avoid the Idaho motor fuels tax on the gasoline used by Phillips Petroleum Company in its management contract, the suppliers of said gasoline, one of which is the plaintiff, Utah Oil Refining Company, have entered into an agreement with the United States Government whereby the documents evidencing the sale of the gasoline, which are employed by the supplying contractor of the gasoline in question, the plaintiff in this action, purportedly pass title to the United States Government outside the State of Idaho and that the gasoline is then delivered to Phillips Petroleum Company at Idaho Falls, Idaho, for use by it in performance of its contract with the Atomic Energy Commission of the United States Government; that this agreement was made expressly for the purpose of avoiding the Idaho motor fuels tax upon this gasoline shipped into the State of Idaho and consumed in vehicles operated by Phillips Petroleum Company upon

highways owned and maintained by the State of Idaho; that this agreement, while it does in form pass title to the United States Government outside the State of Idaho, in substance is a transaction whereby the supplying contractor, Utah Oil Refining Company, actually is furnishing gasoline to Phillips Petroleum Company, the managing contractor at the National Reactor Testing Station in Idaho, for use by Phillips in the performance of its contract with the United States Government, including the operation of motor vehicles and buses as previously set out; that the motor fuel tax reports filed by the plaintiff, copies of which are attached hereto as exhibits, and which exhibits are identical with those attached to plaintiff's Re-[fol. 383] quest for Admissions previously filed in this action, indicate that not all of the gasoline in question was delivered to the United States Government in the State of Utah, but in fact indicates that during the months of November, December of 1959, and January, 1960, the purchaser of said gasoline was Phillips Petroleum Company as shown on plaintiff's motor fuels tax reports filed for said months.

That the discovery procedure followed by the defendant in the Phillips Petroleum Company case indicates that in fact the gasoline which is in question in the above-entitled action filed by the Utah Oil Refining Company is ordered and received in Idaho by Phillips Petroleum Company, as the motor fuel tax reports filed by Utah Oil Refining Company indicate; that representatives of Phillips Petroleum Company have admitted to your affiant that the purchasing arrangement between the Atomic Energy Commission, Phillips Petroleum Company and the suppliers of the gasoline, one of which is the plaintiff, Utah Oil Refining Company, was for the express purpose of avoiding the Idaho motor fuels tax.

That regarding the matters set out in the affidavits attached to plaintiff's motion for summary judgment, this defendant has no personal knowledge of most of the facts set out therein; that the facts there alleged are peculiarly within the knowledge of the Utah Oil Refining Company, Phillips Petroleum Company, and the United States Government; that the defendant is unable to admit or deny

the facts alleged therein because of said lack of personal knowledge, except that defendant denies any of said facts which are in conflict with the facts alleged in this affidavit; that the only possible source of information to the defendant regarding the facts set out in plaintiff's complaint [fol. 384] is the examination and cross-examination of employees of the Utah Oil Refining Company, Phillips Petroleum Company, and the United States Government; that unless defendant is accorded his right to a trial of the above-entitled action and an opportunity to examine and cross-examine the employees of said Utah Oil Refining Company, Phillips Petroleum Company, and the United States Government, a grave injustice will be done to the State of Idaho in the presentation of its defense, particularly with regard to the collusive agreement between the Utah Oil Refining Company, Phillips Petroleum Company, and the employees of the Atomic Energy Commission, which agreement attempts to avoid the Idaho motor fuels tax on the gasoline referred to in plaintiff's complaint.

Further your affiant saith not.

P. G. Neill

Subscribed and Sworn to before me this 8th day of March, 1961.

Robert E. Bakes, Notary Public for Idaho, Residing  
at Boise, Idaho.

(Seal)

[fol. 385] Exhibits referred to:

Motor Fuel Tax Report for November, 1959  
Motor Fuel Tax Report for December, 1959  
Motor Fuel Tax Report for January, 1960  
Motor Fuel Tax Report for February, 1960  
Motor Fuel Tax Report for March, 1960  
Motor Fuel Tax Report for April, 1960  
Motor Fuel Tax Report for May, 1960  
Motor Fuel Tax Report for June, 1960  
Motor Fuel Tax Report for July, 1960



Motor Fuel Tax Report for August, 1960  
Motor Fuel Tax Report for September, 1960  
Motor Fuel Tax Report for October, 1960

[fol. 386]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF ROBERT E. BAKES,  
ASSISTANT ATTORNEY GENERAL—Filed March 9, 1961

State of Idaho,  
County of Ada, ss.

Robert E. Bakes, being first duly sworn, deposes and says:

That he makes this affidavit in support of defendant's motion to dismiss plaintiff's motion for summary judgment and further he makes said affidavit in opposition to plaintiff's motion for summary judgment.

That your affiant is an Assistant Attorney General of the State of Idaho, assigned to the Office of State Tax Collector, and as such is the attorney for the defendant in the above-entitled action; that as such he is familiar with the above-entitled case, and makes this affidavit based upon that personal knowledge.

That the facts alleged in the affidavits filed by the plaintiff in support of plaintiff's motion for summary judgment are peculiar to the plaintiff and unknown to the defendant in this action; that the defendant has had no adequate means to determine the truth or falsity of most of these allegations; that there is another case pending in the above-entitled Court entitled Phillips Petroleum Company v. P. G. Neill, Civil No. 29542, involving the same issues now before the Court, the only difference being that said case involves the question of Idaho motor fuels tax on gasoline supplied and used by Phillips Petroleum Company in performance of its management contract with the Atomic Energy Commission during the one year period next preceding the year in question in the above-entitled action filed



[fol. 387] by Utah Oil Refining Company; that said case filed by Phillips Petroleum Company, being Civil No. 29452, is set for trial on April 5, 1961, on the same issues which plaintiff, Utah Oil Refining Company, is now raising by its motion for summary judgment; that defendant has and is pursuing a comprehensive course of discovery proceeding in the Phillips Petroleum Company case in order to present his defense in that action; that the discovery procedure followed by the defendant in the Phillips Petroleum Company case will give to the defendant information necessary to defend that action as well as the information necessary to defend the action filed by the plaintiff, Utah Oil Refining Company, in the above-entitled action; that it is the contention of the defendant that the plaintiff in the above-entitled action, Utah Oil Refining Company, is acting in concert with Phillips Petroleum Company, managing contractor for the Atomic Energy Commission at the National Reactor Testing Station near Arco, Idaho, and with the United States Government in an express attempt to avoid the Idaho motor fuels tax upon the gasoline which the plaintiff, Utah Oil Refining Company, is supplying and which Phillips Petroleum Company is using in motor vehicles which it operates over the highways of the State of Idaho; that if plaintiff's motion for summary judgment is granted, the defendant will not be permitted to examine and cross-examine employees of said Utah Oil Refining Company, Phillips Petroleum Company, and the United States Government in order to establish the facts regarding this express attempt to avoid Idaho's motor fuels tax and thereby great injustice will be done to the defendant in his defense in this cause.

Further your affiant saith not.

[fol. 388]

Robert E. Bakes

Subscribed and Sworn to before me this 8th day of March, 1961.

Alta Joyce Crawford, Notary Public for Idaho, Residing at Boise, Idaho.

(Seal)

[fol. 389]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MOTION TO DISMISS PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT—Filed March 9, 1961

Comes Now the defendant P. G. Neill, Tax Collector of the State of Idaho, and moves to dismiss the plaintiff's motion for summary judgment on the grounds and for the reasons that the remedy of summary judgment provided by Rule 56 of the Idaho Rules of Civil Procedure is not properly applicable to the above-entitled action.

This motion is made upon the records on file in this case and upon the enclosed affidavit of Mr. P. G. Neill, Tax Collector of the State of Idaho, and upon the affidavit of Robert E. Bakes, Assistant Attorney General of the State of Idaho, attorney for the defendant, and upon the brief of the defendant in support of this motion.

Dated this 8th day of March, 1961.

Frank L. Benson, Attorney General of Idaho, By  
Robert E. Bakes, Assistant Attorney General, At-  
torneys for Defendant, Residing at Boise, Idaho.

[fol. 392]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF W. A. ERICKSON—Filed March 10, 1961

State of Idaho,  
County of Bonneville, ss.

W. A. Erickson, Being first duly sworn, upon his oath,  
deposes and states:

I.

That he is the duly appointed, qualified and acting Direc-  
tor of the Contract Administration Division of the Idaho

Operations Office of the Atomic Energy Commission; that he has personal knowledge of the facts herein set forth; that said facts are true and that he is competent to testify as to the matters so set forth herein.

## II.

That this affidavit is submitted in support of Plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

## III.

That all gasoline purchased in connection with the contract between the Government and the Plaintiff, Utah Oil Refining Company, was delivered to storage tanks owned by the Government in Idaho.

## IV.

That with the exception of two leased vehicles all gasoline purchased by the Atomic Energy Commission was consumed in motor vehicles which at all times material to this action were owned by and titled in the Government; that [fol. 393] all vehicles in which the gasoline was consumed were operated for the Atomic Energy Commission for the purpose of transporting persons who were engaged in and were performing work for the Atomic Energy Commission at the National Reactor Testing Station.

## V.

That a fee was charged for the transportation of certain persons using Government-owned buses, which fee accrued to the sole use of and benefit of and became the property of the Government and was deposited in a bank account belonging to the Government.

## VI.

That said Government-owned buses have continuously been operated at a loss which loss is fully absorbed by the Government.

Further your Affiant saith not.

W. A. Erickson, Director, Contract Administration  
Division, Idaho Operations Office, United States  
Atomic Energy Commission.

Subscribed and Sworn to before me this 9th day of  
March, 1961.

Charles R. Griffin, Notary Public for Idaho, Resi-  
dence: Idaho Falls, Idaho.

(Seal)

My Commission expires July 10, 1961.

[fol. 394] Acknowledgment of service (omitted in print-  
ing).

[fol. 399]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

SUPPLEMENTAL AFFIDAVIT OF P. G. NEILL, TAX COLLECTOR OF  
THE STATE OF IDAHO—Filed March 15, 1961

State of Idaho,  
County of Ada, ss.

P. G. Neill, Tax Collector of the State of Idaho, being first  
duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting Tax  
Collector of the State of Idaho, and as such is personally  
acquainted with the tax avoidance controversy which has  
arisen between the State of Idaho and the gasoline sup-  
pliers of Phillips Petroleum Company, managing contrac-  
tor for the National Reactor Testing Station near Arco,  
Idaho.

That prior to the year 1951 the gasoline supplied to the  
management contractor at said National Reactor Testing  
Station was delivered at or near Idaho Falls, Idaho into

storage tanks and there dispensed into the vehicles which were consuming said gasoline; that the Idaho State motor fuels tax was imposed upon the suppliers of said gasoline, and was paid under protest by them; that the Atomic Energy Commission of the United States Government protested to the State of Idaho for imposing the Idaho motor fuels tax upon said gasoline; that pursuant to negotiation the Atomic Energy Commission requested an opinion of the Comptroller General of the United States regarding the question of whether or not the Idaho motor fuels tax imposed upon the suppliers of said gasoline was constitutional; that the attached exhibit is a copy of said opinion of the Comptroller General of the United States, dated November 5, 1951, in which said Comptroller General [fol. 400] ruled that the Idaho motor fuels tax was validly imposed upon said gasoline sold by suppliers for use by the managing contractor of said National Reactor Testing Station.

That after receiving said opinion, and at a time unknown to this affiant, the Idaho office of the Atomic Energy Commission, the management contractor of the National Reactor Testing Station in Idaho, and suppliers of said gasoline entered into a collusive agreement for the express purpose of avoiding the Idaho motor fuels tax; that said scheme was accomplished by an arrangement whereby title was purportedly passed from the supplier of said gasoline to the Atomic Energy Commission outside the state of Idaho thereby attempting to constitute the transaction as a sale in interstate commerce for the express purpose of making the Idaho motor fuels tax unconstitutional as applied to that transaction; that the substance of the gasoline supply and consumption transaction for the National Reactor Testing Station in Idaho after the inauguration of this scheme was not changed from the procedure practiced prior to the receipt of the opinion of the Comptroller General attached hereto; that the only change in the transaction before and after the initiation of this scheme was merely the purported change in the place of passage of title to said gasoline from within the State of Idaho to outside the State of Idaho; that said purported change was accomplished, if at all, by



merely changing of the name upon the bill of lading as said gasoline is transported into the State of Idaho; that said change in procedure is not a change in substance but is merely a formalism for the express purpose of avoiding the Idaho motor fuels tax.

That all of said transaction was performed in secret between the parties thereto, and the facts thereof are generally unknown to this defendant except as related generally by employees of the interested parties, and as the facts have been discovered by interrogatories and other discovery practiced in the case of Phillips Petroleum Company v. P. G. Neill, Civil No. 29452, which case is presently pending before this Court; that because of the secret nature of said transaction your affiant has been unable to adequately obtain sufficient facts to prepare a defense to this motion for summary judgment and your affiant states that unless he is given an opportunity to examine and cross-examine all possible witnesses to said collusive scheme that a great injustice will be done to the State of Idaho.

P. G. Neill

Subscribed and Sworn to before me this 14th day of March, 1961.

Robert E. Bakes, Notary Public for Idaho, Residing  
at Boise, Idaho.

(Seal)

Acknowledgment of service (omitted in printing).



[fol. 409]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

STIPULATION RE: PLAINTIFF'S REQUEST FOR ADMISSION AND  
DEFENDANT'S OBJECTIONS THERETO—Filed March 30, 1961

Come Now the plaintiff and defendant, by and through their respective attorneys of record, and in connection with plaintiff's Request for Admission under Rule 36, filed here in upon the 6th day of February, 1961, and the defendant's objections thereto dated the 15th day of February, 1961, it is hereby stipulated and agreed as follows:

1. That Request for Admission No. A-5 may be deemed withdrawn by plaintiff.

2. That the following portion of Request for Admission No. A-6, on page 2, shall be deemed admitted by the defendant, to wit:

"That the defendant has contended and still contends that by reason and by virtue of Title 49, Chapter 12 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) the plaintiff is liable for the payment of the motor fuel tax at the rate of six cents (\$0.06) per gallon on the gasoline sold and delivered and imported into the State of Idaho. That plaintiff has filed with the office of Tax Collector of the State of Idaho, Motor Fuels Division, motor fuel tax reports covering the motor fuel sold by plaintiff \* \* \* during each and every [fol. 410] calendar month beginning with the month of November 1959, and through and including the month of October, 1960."

It Is Further Stipulated and Agreed that the remaining portion of Request No. A-6, on page 2, may be deemed withdrawn by the plaintiff.

3. That the words "to the Atomic Energy Commission" in line three (3) of Request for Admission No. A-6, on page 3, may be deemed withdrawn by the plaintiff and deleted from the said Request.

4. That with regard to Requests Nos. B-11 and B-12, the defendant hereby withdraws his objections to these Requests and admits that the motor fuel tax reported referred to in the said Requests are true and correct copies of the originals filed with the defendant.

5. That in all other respects the defendant's objections filed as aforesaid may be deemed withdrawn, and the hearing thereon vacated.

Dated this 15th day of March, 1961.

Calvin Dworshak, 326 Bank of Idaho Building, Boise, Idaho, Attorney for Plaintiff.

Frank L. Benson, Attorney General of the State of Idaho, By: Robert E. Bakes, Assistant Attorney General, Residing at Boise, Idaho, Attorneys for Defendant.

[fol. 411]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ORDER SUBSTITUTING PARTY-PLAINTIFF—  
Filed March 30, 1961

This matter having come on regularly upon the motion of Plaintiff for an order substituting the Party-Plaintiff, and good cause appearing therefor, it is hereby

Ordered That The American Oil Company, a Maryland corporation, be, and it hereby is, substituted as Plaintiff herein in place of the Utah Oil Refining Company, a Delaware corporation, for all purposes and that the title to the action be amended accordingly, and that the action be continued by and in the name of the said The American Oil

Company, a corporation, without prejudice to any proceeding already had in this action.

Dated This 30 day of March, 1961.

Merlin S. Young, District Judge.

Approved as to Form and Content:

Calvin Dworshak, 326 Bank of Idaho Building, Boise, Idaho, Attorney for Plaintiff.

Robert E. Bakes, Assistant Attorney General of the State of Idaho, Attorney for Defendant.

[fol. 412]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

SUPPLEMENTAL AFFIDAVIT OF ROBERT E. BAKES—  
Filed April 3, 1961

State of Idaho,  
County of Ada, ss.

Robert E. Bakes, Assistant Attorney General of the State of Idaho, attorney for the defendant in the above-entitled action, being first duly sworn, upon his oath deposes and says:

That he makes this affidavit in support of defendant's motion to dismiss plaintiff's motion for summary judgment, and defendant's alternative motion for an extension of time to reply to said motion for summary judgment, and further that he makes this affidavit in opposition to plaintiff's motion for summary judgment to show to the Court that there are issues of fact which are unresolved in this action.

That your affiant is an Assistant Attorney General of the State of Idaho, assigned to the Office of the State Tax Collector, and as such is the attorney for the defendant in the above-entitled action; that as such he is familiar with the above-entitled action and makes this affidavit based upon

that personal knowledge; that the facts set out in the affidavits filed by the plaintiff in support of plaintiff's motion for summary judgment are peculiar to the plaintiff and unknown to the defendant in this action; that the defendant has no adequate means to determine the truth or falsity of the allegations contained in the affidavits supporting plaintiff's motion for summary judgment except by the discovery practice provided for in the Idaho Rules of Civil Procedure; that the defendant has followed a comprehensive course of [fol. 413] discovery in the companion case of Phillips Petroleum Company v. P. G. Neill, Civil No. 29452, in which the same issues raised by the plaintiff's complaint in this action are under consideration by this Court; that said discovery procedure includes interrogatories, requests for admissions, demands for production of documents, and upon the 17th day of March, 1961, the defendant took the depositions of Howard Davis, Wayne M. Cathey and A.A. Anselmo, employees of Phillips Petroleum Company at the National Reactor Testing Station at Idaho Falls, Idaho, and also the depositions of W.A. Erickson and K.W. Grundmeyer, employees of the Atomic Energy Commission at the National Reactor Testing Station at Idaho Falls, Idaho; that at the time that plaintiff herein filed its motion for summary judgment and affidavits in support thereof, and at the time that defendant filed his original responding affidavits and brief, the aforementioned depositions were scheduled but had not been taken; that the facts testified to in the aforementioned depositions taken on the 17th day of March, 1961, raised several issues of fact concerning matters alleged in the affidavits supporting plaintiff's motion for summary judgment; that the reporter who reported said depositions had not yet had time to prepare and transcribe said depositions and therefore the transcribed depositions are not available for viewing by the Court at this time.

That at said depositions the witness A.A. Anselmo testified under oath that he was an employee of Phillips Petroleum Company at the National Reactor Testing Station at Idaho Falls, Idaho, employed as a traffic agent; he further testified that he personally ordered from the suppliers the gasoline supplied to Phillips Petroleum Company which was

[fol. 414] used in its management contract; that this procedure was followed by him (Mr. Anselmo) from approximately the beginning of his employment with Phillips Petroleum Company in 1953 until approximately November of 1960, which would include the gasoline referred to in plaintiff's complaint; he further testified that he personally selected the common carriers which transported the gasoline referred to in plaintiff's complaint to Idaho Falls, Idaho, where the gasoline was removed from said vehicles under the supervision of employees of Phillips Petroleum Company; it was further testified in said depositions that the transportation charges were paid to said common carriers by the Phillips Petroleum Company.

Your affiant has no personal knowledge of the facts testified to under oath in the aforementioned depositions, said knowledge being solely with the employees of Phillips Petroleum Company and the Atomic Energy Commission; your affiant alleges, however, based upon the sworn testimony elicited at the taking of said depositions, the facts to be that the gasoline referred to in plaintiff's complaint was in fact ordered by Phillips Petroleum Company, through its employee, A.A. Anselmo, and further that the common carriers which transported the gasoline referred to in plaintiff's complaint into the State of Idaho were chosen in fact by Phillips Petroleum Company through its employee, A.A. Anselmo, and further that payment for the transporting of the gasoline into the State of Idaho by the common carriers was in fact made by Phillips Petroleum Company through its employees.

That your affiant further states that some of the facts elicited in the taking of the aforementioned depositions indicates that there are other witnesses who have facts relevant [fol. 415] to the determination of this action and whose names are yet unknown to the defendant or to the defendant's counsel; that further discovery practice will be necessary in order to locate and interview the witnesses.

Further your affiant said not.

Robert E. Bakes.



Subscribed and Sworn to before me this 31st day of March, 1961.

Alta Joyce Crawford, Notary Public for Idaho, Residing at Boise, Idaho.

(Seal)

Acknowledgment of service (omitted in printing).

[fol. 416]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ALTERNATIVE MOTION—Filed April 3, 1961

Whereas, the defendant P.G. Neill, Tax Collector of the State of Idaho, on the 9th day of March, 1961, filed his motion to dismiss the plaintiff's motion for summary judgment for the reasons set out in said motion and the affidavits attached thereto,

Now, Therefore, Comes Now the defendant and moves in the alternative for an order pursuant to Rule 56(f) of the Idaho Rules of Civil Procedure extending the time for the defendant to submit additional depositions and affidavits in opposition to plaintiff's motion for summary judgment as provided in said Rule 56(f).

This motion is made upon the records on file in this case and upon the attached affidavit of Robert E. Bakes, Assistant Attorney General of the State of Idaho, attorney for the defendant in the above-entitled action.

Dated this 31st day of March, 1961.

Frank L. Benson, Attorney General of Idaho, by  
Robert E. Bakes, Assistant Attorney General, Attorney for Defendant, Residing at Boise, Idaho.

Acknowledgment of service (omitted in printing).



[fol. 420]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MEMORANDUM DECISION—June 20, 1961

## APPEARANCES:

For the Plaintiff—Calvin Dworshak, attorney at law,  
Boise, Idaho.

For the Defendant—Frank L. Benson, Attorney General  
of Idaho, and Robert E. Bakes, Assistant Attorney General  
of Idaho.

The above entitled action is now pending before this  
Court upon a number of motions. These are:

1. Defendant's motion to dismiss on the ground that  
plaintiff's complaint does not state a claim upon which re-  
lief can be granted.

2. Plaintiff's motion for summary judgment on the  
ground that there are no genuine issues of material fact in  
dispute and that plaintiff is entitled to a judgment as a  
matter of law.

3. Defendant's motion to dismiss plaintiff's motion for  
summary judgment on the basic ground that there are  
matters solely within the knowledge of plaintiff and others  
which are material to the issues, which defendant cannot  
at this time produce in opposition to plaintiff's motion for  
summary judgment; or, in the alternative, that defendant  
be granted additional time to submit additional depositions  
and affidavits in opposition to plaintiff's motion for sum-  
mary judgment.

Whether defendant's last named motion should be  
granted or not depends upon a determination of whether  
the proposed or prospective evidence would have a material  
bearing upon a decision of the ultimate issue in controversy.  
[fol. 421] This requires a rather extensive review of the  
pleadings and factual matters now in the record.

The ultimate issue to be decided in this case is the va-  
lidity and constitutionality of defendant's application of

Chapter 12, Title 40 of the Idaho Code, dealing with motor fuel taxes, to the facts of the particular transaction involved in this action. Defendant has collected the excise tax provided for by Section 49-1210 I.C. from plaintiff, under the theory that the gasoline in question was "received" by plaintiff under the provisions of Section 49-1201 (g).2, I.C., which provides in its essential parts:

"Motor fuel imported into this state other than that placed in storage \* \* \* shall be considered received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer's permit shall be considered to have been received by the dealer shipping or bring the same into this state; *further provided that motor fuel that is in any manner supplied, sold, or furnished to any person or agency, whatsoever, not the holder [fol. 422] of an uncanceled Idaho dealer's permit, by an Idaho licensed dealer, for importation into the state of Idaho, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such fuel immediately after the imported motor fuel has been unloaded in the state of Idaho. \* \* \**"

"4. Motor fuel acquired in this state by any person, other than as set forth in paragraphs (1), (2) and (3) of this subsection, shall, unless the person from whom the same is acquired has with respect thereto paid or incurred liability for, or the burden of, the tax imposed by this chapter or unless the same shall be exempt \* \* \* be considered to be first received by the person so acquiring the same at the time so acquired." (Italics mine.)

In general terms, the facts now established without controversy are, that in June, 1959 the General Services Ad-

ministration of the U.S. Government issued an invitation for bids for furnishing gasoline to certain governmental agencies in the states of Montana, Idaho, Oregon and Washington for the period of November 1, 1959 through October 31, 1960; that in said invitation were items covering the purchase of gasoline for the Atomic Energy Commission and National Reactor, at Idaho Falls, Idaho; that on October 28, 1959 plaintiff's bid was accepted and GSA formally awarded the contract to plaintiff at Seattle, Washington, under bid items 63A and 64A. The gasoline was sold at a designated price, f.o.b. Bulk Plant, Salt Lake City, Utah. Pursuant to the terms of the contract the A.E.C. was the [fol. 423] ordering activity, and upon order of the A.E.C. or its operating company, Phillips Petroleum, plaintiff delivered some 1,436,355 gallons of gasoline to common carriers selected by the A.E.C. or its operating company, Phillips Petroleum Co., who transported it to Idaho Falls, where it was placed in A.E.C. owned storage tanks and used in A.E.C. operations in Idaho. Part of such use was the operation of government owned buses for transportation of workers to the NRT site over Idaho state highways; that by a contract between the A.E.C. and Phillips Petroleum Co., most of the actual operation is done by Phillips.

Because plaintiff was at all times a holder of an Idaho dealer's permit pursuant to Title 49, Chapter 12, Idaho Code, and the A.E.C. was not, defendant insisted that plaintiff pay the tax imposed by Section 49-1210 I.C., under the theory that plaintiff was a "receiver" of this gasoline pursuant to the provisions of 49-1201 (g) 2, providing that motor fuel

"supplies, sold or furnished to any \* \* \* agency, not the holder of an uncanceled Idaho Dealer's Permit, by an Idaho licensed dealer, for importation into the state from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, immediately after the imported motor fuel has been unloaded. \* \* \*

It seems clear that the transaction above outlined falls within the terms of the statute, and if the statute or its

application here is valid, then the tax is proper. Plaintiff contends that the provision is unconstitutional and invalid, as here applied, in that the 14th Amendment, the Commerce [fol. 424] Clause and the Supremacy Clause of the U.S. Constitution are violated; as is the Due Process Clause of the Idaho Constitution. Plaintiff has paid the taxes in question with appropriate protests, and now seeks reimbursement together with interest.

Defendant contends that there may be additional facts which he will be able to present on trial or with further discovery, which are necessary to a decision of this case. As revealed by defendant's affidavits, these facts will be that the gasoline here involved was consumed in the state of Idaho by Phillips Petroleum Co. in the furtherance of its management contract with the A.E.C. by which Phillips operates certain motor vehicles over Idaho highways to transport employees of various private corporations to the NRT near Arco, Idaho; that Phillips Petroleum charges a fee for transportation of such employees; that the gasoline is delivered to the custody of Phillips at Idaho Falls and is there introduced into the various vehicles by Phillips.

It should be noted that defendant does not controvert or contend that he can controvert the affidavits of W.A. Erickson that the vehicles in question are solely owned or leased by the A.E.C. and that the fees received by passengers are the property of the U.S. Government or A.E.C.

In the final analysis, defendant contends that on trial or after additional discovery he can show in substance that the overall transaction is the sale of gasoline by plaintiff to Phillips Petroleum Co. for use in operating motor vehicles over the highways of the state of Idaho. (Page 3 defendant's brief on motion to dismiss summary judgment.)

Defendant contends also that he may be able to show [fol. 425] that there was a collusive agreement between the A.E.C., Phillips Petroleum and plaintiff, by which they established the procedures in question to avoid payment of the Idaho Fuel Tax.

It appears to me that the proposed evidence of defendant can only become material in this case if the tax in question be considered a "use tax" in the usual sense. This appears

to be defendant's position also, because he relies for the most part on "Sales and Use Tax" cases, i.e.; *General Trading Co. vs. State Tax Commission*, 332 U.S. 335, 88 L. Ed. 1309; *Miller Bros. Co. vs. Maryland*, 347 U.S. 340; 89 L. Ed. 744; *Scripto, Inc. vs. Carson*, 4 L. Ed. 2d 660; *McGoldrich vs. Berwind White Coal Mining Co.*, 309 U.S. 33; *McGoldrich vs. Felt & Tarrant Manufacturing Co.*, 309 U.S. 70. In each of these cases a "sales" or "use" tax was involved which placed the incidence of the tax and the economic impact of the tax on the ultimate buyer or consumer, in clear and certain terms, and the states were allowed to require an out-of-state vendor to "collect" it for them. The usual use tax is a defensive tax by a state to support a retail sales tax, and taxes the use, consumption or storage of a particular commodity. A good example of what I consider a true use tax to be, is our Idaho Special Fuels Use Tax (Section 49-1231 I.C.), which levies an "excise tax of 6 cents per gallon on the use of special fuel in any motor vehicle while operated upon the highway \* \* \*." The tax is collected by the special fuel dealer, and clearly falls on the user or consumer in its ultimate impact.

The "gasoline" fuel tax statute with which we are here involved, however, is ambiguous, as regards its true nature. By Section 49-1210 I.C. it places the tax directly upon the dealer and requires him to:

[fol. 426] "pay an excise tax of 6 cents per gallon on all motor fuels 'received' as defined by Section 49-1201 \* \* \* less the deductions and credits authorized, \* \* \*"

which are (A) exported fuel (49-1215), (B) aviation fuel, (C) exempt use (non-highway) and (D) 2% shrinkage and expense reimbursement, one-half of which must be passed on to the actual dealer.

While the term "received" has varying meanings as used in 49-1201, the end effect is to place the burden of the tax directly on the licensed dealer except as provided in subsection (g) 4 when there is no licensed dealer. The tax is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of



sale, delivery, or consumption of the same in the state, except in a factual situation such as is here involved.

However, there is an indication that the legislature felt that the ultimate impact of the tax would be on the consumer of the fuel when it allowed a claim of refund by the purchaser-consumer for non-highway use (49-1218 I.C.), and made no provision for the licensed dealer to claim such refunds unless he personally used gasoline for non-highway purposes (49-1210 (e)). This is the only indication in the Act that the excise tax is a special sales or use tax on the consumer in the usual sense. However, the dealer is not in any way required to pass the tax on or collect it from the consumer, and the ultimate purchaser or consumer has no responsibility whatsoever for payment of the tax. While it may be the overall policy of the state to collect a tax of 6¢ per gallon on all gasoline used to propel motor vehicles [fol. 427] over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the "receipt" of the gas by the dealer. It cannot be said under this statute that the licensed dealer is the mere collector of a tax from the purchaser or user, as was the holding in each of the cases relied upon by the defendant (supra). The Idaho administrative interpretation of the statute in the past has been to treat it as a privilege tax upon the dealer and not as a sale or use tax on the consumer. I conclude this is the correct interpretation.

It follows, then, that the evidence which defendant feels he may be able to produce, would not be material to a decision of this case, because if it is not a "use tax," it becomes unimportant who was the actual purchaser. Therefore, defendant's motion to dismiss the summary judgment or to give him additional time to produce proof of this nature for purposes of the summary judgment motion should be denied.

If the tax in question cannot be justified as a "use tax," it is under the facts of this case a tax on a privilege which is exercised and performed wholly outside of the state of Idaho, and is a violation of the Commerce Clause and Due Process of Law. It is clear that the contract in question was wholly made, executed and performed outside the state of



Idaho. The only incidents which connect the state of Idaho with the transaction at all are (1) the circumstance that plaintiff happens to be a licensed dealer in Idaho—if it were not, Idaho would have no hold on it whatsoever; and (2) the gasoline, the legal title to which passed to either the U.S. Government or Phillips Petroleum Co. outside the state of Idaho, was imported into the state by its owner.

[fol. 428] The U.S. Supreme Court decision which involves a situation closest to the facts of this case, in my opinion, is *Morton Co. vs. Dept. of Revenue of the State of Illinois*, (1951) 340 U.S. 534, 95 L. Ed. 517. In this case the Norton Co., whose home was in Massachusetts, was authorized to do business in Illinois and maintained a warehouse and branch office in Illinois. Part of its sales were made locally and a part were by direct order to the Massachusetts office and shipped directly to Illinois purchasers in interstate commerce. The Illinois tax was on "persons engaged in the business of selling tangible personal property at retail in" Illinois, and the U.S. Supreme Court said:

"Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod vs. J. E. Dilworth Co.*, 322 U.S. 327, 88 L. Ed. 304, 64 S. Ct. 1023, 1030. *Of course a state imposing a sales or use tax can more easily meet this burden because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor.*

"But when, as here, the corporation has gone into the state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature."  
(Italics mine.)

[fol. 429] It is my opinion that plaintiff in the case at bar has clearly shown that the transaction in question is

"dissociated from (its) local business and (is) interstate in nature." It appears to me that Idaho in this instance is attempting to levy the tax on the privilege of doing interstate business, in violation of the U.S. Constitution. *General Trading Co. vs. State Tax Commission*, 322 U.S. 335; *McLeod vs. J. E. Dilworth Co.*, 322 U.S. 327.

In addition, under the facts of this case I am of the opinion that there is a denial of due process to plaintiff as the result of the levy of the tax, because the tax is really levied on a privilege exercised in Utah and derived from the laws of that state. There is insufficient "nexus" between plaintiff and the State of Idaho. See *Miller Bros. vs. Maryland*, 347 U.S. 340, 98 L. Ed. 744, wherein the Supreme Court said:

"It there is some jurisdictional fact or event to serve as a conductor, the reach of a state's taxing power may be carried beyond its borders. When it has the taxpayer within this power or jurisdiction it may sometimes, through him reach his extraterritorial income or transactions, and it may sometimes, through these reach the non resident. \* \* \*"

"Due process requires some definite link, some minimum connection between a state and a person, property or transaction it seeks to tax."

See also *Connecticut General Life Ins. Co. vs. Johnson*, [fol. 430] 303 U.S. 77; and *James vs. Dravo Contracting Co.*, 302 U.S. 134, and similar cases cited by plaintiff in its brief.

Thus in summary I conclude that the tax in question is basically a tax on the privilege of licensed petroleum dealers to own gasoline in Idaho for sale or use in Idaho, and that it is not a use tax, the impact of which is on the local consumer. As such, the tax as here applied to a sale made in Utah is a tax on interstate commerce and a violation of due process of law, in that it taxes a privilege of plaintiff exercised outside of Idaho's jurisdiction.

Lastly, I would point out that if defendant's theories as to the ownership of the gasoline at the time of its impor-

tation into the state of Idaho are correct, that is, that Phillips Petroleum Co. was the true owner, this gasoline need not escape taxation, because Phillips would be clearly liable for it, but this plaintiff would not. Phillips could be said to have received it under 49-1201 (g) 2 I.C., if it is a licensed dealer, or if it is not a licensed dealer, it could be held under 49-1201 (g) 4 I.C. If the U.S. Government was the true purchaser and owner, plaintiff would not be liable for the tax, even if I am in error and it is a use tax on the consumer, because of federal government immunity. If it is a privilege tax on plaintiff, as I here hold, its application in this case is still unconstitutional, regardless of the ownership of the gasoline at the time of its importation, unless plaintiff owns it.

Thus I conclude that plaintiff is entitled to a summary judgment for a refund of the tax paid herein, but as defendant has pointed out, the issue of right to interest has [fol. 431] not been presented to me. I feel the parties should be granted an opportunity to present their views thereon. I will therefore hold up entry of summary judgment until counsel has presented their views on this issue. Please consult and advise me how you wish to do this.

Dated this 20th day of June, 1961.

Merlin S. Young, District Judge.

[fol. 434]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

SUPPLEMENTAL MOTION TO DISMISS—Filed July 31, 1961

Comes Now the defendant, Vernon E. Drown, acting Tax Collector of the State of Idaho, and moves this Court for an order dismissing the original and supplemental complaints filed by the plaintiff in the above-entitled action, and for grounds and reasons therefor alleges that this Court has no jurisdiction over the subject matter contained in plaintiff's original or supplemental complaint.

Dated this 28th day of July, 1961.

Frank L. Benson, Attorney General of Idaho, By  
Robert E. Bakes, Assistant Attorney General, At-  
torneys for Defendant, Residing at Boise, Idaho.

Acknowledgment of service (omitted in printing).

[fol. 446]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

STIPULATION FOR SUBSTITUTION OF PARTY-DEFENDANT—  
Filed August 15, 1961

It Is Hereby Stipulated and Agreed That the above-named Defendant has resigned from the office of Tax Collector of the State of Idaho and that his resignation was duly accepted; and that Vernon E. Drown was thereupon appointed as Acting Tax Collector of the State of Idaho by the Honorable Robert E. Smylie, Governor of the State of Idaho, on which day the said Vernon E. Drown entered upon his duties in said office, and is now lawfully acting in said office.

It Is Further Stipulated and Agreed That the said Vernon E. Drown be substituted herein as the Defendant in the above-entitled action in lieu and in place of P. G. Neill, for all purposes, and that said action be continued, without prejudice to any prior proceedings, in the name of Vernon E. Drown as Acting Tax Collector of the State of Idaho, as Defendant, and that an order be entered herein to that effect and that further proceedings in this cause may be had as Defendant by the said Vernon E. Drown.

Dated This 3rd day of July, 1961.

Calvin Dworshak, 326 Bank of Idaho Building, Boise,  
Idaho, Attorney for Plaintiff;

Frank L. Benson, Attorney General of the State of  
Idaho, By Robert E. Bakes, Assistant Attorney  
General of the State of Idaho, Boise, Idaho, At-  
torneys for Defendant.

[fol. 447]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ORDER SUBSTITUTING PARTY-DEFENDANT—July 3, 1961  
Filed August 15, 1961

Upon the reading and filing of the Stipulation for Substitution of Party-Defendant dated the 3rd day of July, 1961, and good cause appearing therefor, it is hereby

Ordered:

That Vernon E. Drown be, and he hereby is, substituted herein as the Defendant in the above-entitled action as of the first day of July, 1961, in lieu and in place of P. G. Neill, for all purposes, and that said action be continued, without prejudice to any prior proceedings, in the name of Vernon E. Drown as Acting Tax Collector of the State of Idaho, as Defendant.

Dated This 3rd day of July, 1961.

Merlin S. Young, District Judge.

[fol. 450]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MOTION FOR ORDER MODIFYING ORDER SUBSTITUTING PARTY-  
DEFENDANT AND NOTICE—Filed August 17, 1961

Comes Now, The Plaintiff and moves this Honorable Court for an order modifying nunc pro tunc the order entered herein upon the 3rd day of July, 1961, substituting Vernon E. Drown, Acting Tax Collector of the State of Idaho, as Defendant in the above-entitled action in lieu and in place of P. G. Neill and moves, further, that the above-entitled action be continued against the said P. G. Neill and Vernon E. Drown as Parties Defendant.

This motion is made and based upon the grounds and for the reasons following, to wit:

1. The above entitled action is an action to recover motor fuel taxes paid involuntarily, under duress and protest by the Plaintiff to the said P. G. Neill under the terms and provisions of an unconstitutional statute; that at the time said taxes were paid the said P. G. Neill had written notice from the Plaintiff that it was paying said taxes under duress, involuntarily, and in fear of penalties, pains and forfeitures which Plaintiff might have incurred had it refused to make such payments.

2. That as such the above-entitled action is an action against the said P. G. Neill for his wrongful acts, which action did not abate upon the resignation of the said P. G. Neill as Tax Collector of the State of Idaho.

3. That the Defendant, Vernon E. Drown, is a proper Party Defendant by reason of his authority to order the refund of said motor fuel taxes, all as appears more fully [fol. 451] in the affidavit of Rulon Swensen, Treasurer of the State of Idaho, filed herewith.

This motion is made and based upon the files, records, pleadings and papers in the above-entitled action and upon the affidavit of Rulon Swensen, State Treasurer, above referred to.

Dated This 16th day of August, 1961.

Calvin Dworshak, Jay L. Webb, 326 Bank of Idaho Building, Boise, Idaho, Attorneys for Plaintiff.

[fol. 452]

#### NOTICE OF MOTION

To: P. G. Neill and to the Defendant and to Their Attorneys of Record, Frank L. Benson, Esquire, Attorney General of the State of Idaho, and Robert E. Bakes, Esquire, Assistant Attorney General of the State of Idaho:

You, and Each of You Will Please Take Notice That on Friday, the 25th day of August, 1961, at the hour of 10:00 o'clock in the forenoon of said day, or as soon thereafter



as Counsel can be heard, at the courtroom of the above entitled Court in the Ada County Court House in Boise City, County of Ada, State of Idaho, Plaintiff will bring the above and foregoing Motion of Plaintiff on for hearing.

Dated This 16th day of August, 1961.

Calvin Dworshak, 326 Bank of Idaho Building,  
Boise, Idaho, Attorney for Plaintiff.

[fol. 515]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ORDER—October 9, 1961

This matter having come on regularly to be heard, and the Court having heard oral arguments and examined the briefs of counsel, and good cause appearing therefor, it is hereby

Ordered as follows:

1. That the Plaintiff's Motion for Order Modifying Order Substituting Party Defendant filed herein upon the 17th day of August, 1961, be, and the same hereby is, granted; and it is Further Ordered that P.G. Neill, former Tax Collector of the State of Idaho, be, and he hereby is reinstated as a Party Defendant in the above entitled action, for all purposes, and that said action be continued without prejudice to any prior proceedings, in the names of P.G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, as Parties Defendant.

2. That the Defendants' Supplemental Motion to Dismiss dated the 28th day of July, 1961, be, and the same hereby is denied.

3. That, by stipulation of counsel for Plaintiff and Defendant made in open court, Plaintiff's Objections to Defen-

dants' Request for Admissions dated the 18th day of August, 1961, be, and the same are hereby, deemed withdrawn.

4. That, by stipulation of counsel for Plaintiff and Defendant made in open court, Defendants' Motion for Production of Documents Under Rule 34 dated the 18th day of August, 1961, be, and the same is hereby, deemed withdrawn.

[fol. 516] 5. That Defendants' Motion to Strike dated the 25th day of August, 1961, be, and the same hereby is, denied.

6. That Defendants' Motion to Dismiss heretofore filed herein upon the 4th day of April, 1960, be, and the same hereby is, denied.

7. That defendants' Motion to Dismiss Plaintiff's Motion for Summary Judgment heretofore filed herein upon the 9th day of March, 1961, be, and the same hereby is, denied.

8. That Defendants' Alternative Motion heretofore filed herein upon the 3rd day of April, 1961, be, and the same hereby is, denied.

9. That Plaintiff's Motion for Summary Judgment heretofore filed herein upon the 17th day of February, 1961, be, and the same hereby is, granted.

Dated This 9th day of October, 1961.

Merlin S. Young, District Judge.

Acknowledgment of service (omitted in printing).

[fol. 519]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

SUMMARY JUDGMENT—October 9, 1961

The motion of the Plaintiff for summary judgment pursuant to Rule 56 (c) of the Idaho Rules of Civil Procedure having been presented, and the Court being fully advised, the Court finds that the Plaintiff is entitled to a summary judgment as a matter of law, and that, therefore, it is hereby

**Ordered, Adjudged and Decreed As follows:**

1. That the terms and provisions of Section 49-1201 (g) 2 of the Idaho Code as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) which states as follows, to wit:

“ . . . motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho . . . ”

along with the provisions of the Idaho Code which render the “receipt” of motor fuel as so defined subject to taxation are invalid, null and void, and are contrary to and violate the terms and provisions of the Constitution of the United States of America and the Constitution of the State of Idaho.

[fol. 520] 2. That the terms and provisions of Title 49, Chapter 12, of the Idaho Code, as amended, and particularly the terms and provisions of Sections 49-1201 and 49-1210 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.), are invalid, null and void, and are contrary to and violate the terms and provisions of the Constitution of the United States of America and the Constitution of the State of Idaho insofar as applied to the Utah Oil Refining Company, a corporation, predecessor in interest to the plaintiff, The American Oil Company, a corporation, upon the transactions set forth in the complaint and supplemental complaints on file herein, and under which terms and provisions the said Utah Oil Refining Company was required to pay motor fuels taxes on such transactions.

3. That there was no lawful right or authority whatsoever for imposition of the aforesaid motor fuels taxes upon the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, on the transactions set forth in the complaint and supplemental complaints on file herein, and the Plaintiff is entitled to recover the sums of money paid as motor fuels taxes as aforesaid.

4. That the Plaintiff, The American Oil Company, a corporation, do have and recover from the Defendants, P.G. Neill, former tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, the sum of Eighty-six Thousand One Hundred Eighty-one and 30/100ths (\$86,181.30) Dollars, together with Plaintiff's costs and expenses necessarily [for. 521] incurred herein, to be hereinafter inserted by the Clerk of this Court in the sum of \$.....

5. That the Defendants, P.G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, are hereby directed to refund and pay, or cause to be paid, to the Plaintiff, The American Oil Company, a corporation, the sum of \$86,181.30 hereby found to have been illegally and erroneously demanded and collected from the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, as motor fuels taxes upon the transactions set forth in the complaint and supplemental complaints on file herein, together with Plaintiff's costs and expenses aforesaid.

Let judgment be entered accordingly.

Dated This 9th day of October, 1961.

Merlin S. Young, District Judge.

Acknowledgment of service (omitted in printing).

[fol. 522]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AFFIDAVIT OF ROBERT E. BAKES—Filed October 13, 1961

State of Idaho,  
County of Ada, ss..

Robert E. Bakes, being first duly sworn, deposes and says:

That he is the duly appointed Assistant Attorney General of the State of Idaho and one of the attorneys for the defendants in the above-entitled action; that in this capacity he has personal knowledge of the facts contained in this affidavit and upon his oath, duly sworn, deposes and states that the following facts are true as he verily believes:

That P.G. Neill resigned in retirement from his employment as Tax Collector of the State of Idaho effective June 30, 1961, which resignation was duly accepted by Robert E. Smylie, Governor of the State of Idaho; that said P.G. Neill is no longer employed by the State of Idaho, nor does he act in any official capacity with regard to discharging any duties or functions of the Office of the Tax Collector of the State of Idaho.

That Vernon E. Drown was duly delegated by Governor Robert E. Smylie as the successor to P.G. Neill, and his appointment was filed in the office of the Secretary of State by the Governor of the State of Idaho; that on the 5th day of September, 1961, said Vernon E. Drown died; that the Governor of the State of Idaho has made no appointment to fill the vacancy created by the death of said Vernon E. Drown and that at the date of this affidavit there is no person nominated and authorized by the Governor of the [fol. 523] State of Idaho to fill the vacancy created by the death of said Vernon E. Drown, or to discharge the duties of the Tax Collector of the State of Idaho.

Further your affiant saith not.

Robert E. Bakes.

Subscribed and Sworn to before me this 13th day of October, 1961.

Alta Joyce Crawford, Notary Public for Idaho, Residing at Boise, Idaho.

(Seal)

Acknowledgment of service (omitted in printing).

[fol. 531]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

MODIFIED ORDER

This matter having come on regularly to be heard, and the Court having heard oral arguments and examined the briefs of counsel, and good cause appearing therefor,  
It Is Hereby Ordered as follows:

1. That the plaintiff's Motion for Order Modifying Order Substituting Party Defendant filed herein upon the 17th day of August, 1961, be, and the same is hereby, granted to the extent that P. G. Neill, former Tax Collector of the State of Idaho, be, and he hereby is, reinstated as a party defendant in the above entitled action in his official capacity only for the purpose of effecting any refund of the moneys referred to in plaintiff's complaint, if said P. G. Neill has any authority remaining to order any such refund after his retirement as Tax Collector of the State of Idaho; that neither P. G. Neill, nor Vernon E. Drown, are personally or individually liable for any of the claim set out in the complaint of the plaintiff herein, said claim of plaintiff being against said defendants in their official capacity only.



2. That the defendants' Supplemental Motion to Dismiss dated the 28th day of July, 1961, be, and the same hereby is, denied.

3. That by stipulation of counsel for plaintiff and defendant made in open court, plaintiff's Objections to Defendants' Request for Admissions dated the 18th day of August, 1961, be, and the same are hereby, deemed withdrawn.

4. That, by stipulation of counsel for plaintiff and defendant made in open court, defendants' Motion for Production of Documents Under Rule 34 dated the 18th day of August, 1961, be, and the same is hereby, deemed withdrawn.

5. That defendants' Motion to Strike dated the 25th day of August, 1961, be, and the same hereby is, denied.

6. That defendant's Motion to Dismiss heretofore filed herein upon the 4th day of April, 1960, be, and the same hereby is denied.

7. That defendants' Motion to Dismiss plaintiff's Motion for Summary Judgment heretofore filed herein upon the 9th day of March, 1961, be, and the same hereby is, denied.

8. That defendants' Alternative Motion heretofore filed herein upon the 3rd day of April, 1961, be, and the same hereby is, denied.

9. That plaintiff's Motion for Summary Judgment heretofore filed herein upon the 17th day of February, 1961, be, and the same hereby is, granted.

Dated this ..... day of October, 1961.

....., District Judge.

Service of the within and foregoing Modified Order by receipt of a copy thereof is hereby acknowledged this 13th day of October, 1961.

Calvin Dworshak, Attorney for Plaintiff, Bank of Idaho Building, Boise, Idaho.

[fol. 535]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

ORDER—October 20, 1961

This matter having come on regularly to be heard upon the Defendants' Motion to Amend Summary Judgment and Motion to Amend Order Reinstating Party Defendant, and good cause appearing therefor, it is hereby

Ordered as follows:

1. That the Summary Judgment entered herein be amended to provide that said judgment shall not be satisfied out of the individual property of said Defendants or either of them.

2. That paragraph 1 of the order entered herein upon the 9th day of October, 1961, be, and the same is hereby, amended by adding at the end of said paragraph 1 thereof the following language:

"That the individual property of said Defendants shall in no way be liable for the satisfaction of any judgment entered in this action."

3. That the aforesaid motions of the Defendants in all other respects be, and the same hereby are, denied.

Dated This 20th day of October, 1961.

Merlin S. Young, District Judge.

Acknowledgment of service (omitted in printing).

[fol. 536]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

AMENDED SUMMARY JUDGMENT—October 20, 1961

The motion of the Plaintiff for summary judgment pursuant to Rule 56 (c) of the Idaho Rules of Civil Procedure having been presented, and the Court being fully advised, the Court finds that the Plaintiff is entitled to a summary judgment as a matter of law, and that, therefore, it is hereby

Ordered, Adjudged and Decreed as follows:

1. That the terms and provisions of Section 49-1201 (g) 2 of the Idaho Code as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75, p. 168 et seq.) which states as follows, to wit:

“ . . . motor fuel which is in any manner supplied sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point or origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho . . . ”

along with the provisions of the Idaho Code which render the “receipt” of motor fuel as so defined subject to taxation are invalid, null and void, and are contrary to and violate the terms and provisions of the Constitution of United States of America and the Constitution of the State of Idaho.

[fol. 537] 2. That the terms and provisions of Title 49, Chapter 12, of the Idaho Code, as amended, and particularly the terms and provisions of Sections 49-1201 and 49-1210 of the Idaho Code, as amended by an Act of the Legislature of the State of Idaho approved on the 7th day of March, 1959 (Idaho Session Laws, 1959, Chapter 75 p. 168 et seq.) are invalid, null and void, and are contrary to and

violate the terms and provisions of the Constitution of the United States of America and the Constitution of the State of Idaho insofar as applied to the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff, The American Oil Company, a corporation, upon the transactions set forth in the complaint and supplemental complaints on file herein, and under which terms and provisions the said Utah Oil Refining Company was required to pay motor fuels taxes on such transactions.

3. That there was no lawful right or authority whatsoever for imposition of the aforesaid motor fuels taxes upon the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, on the transactions set forth in the complaint and supplemental complaints on file herein, and the Plaintiff is entitled to recover the sums of money paid as motor fuels taxes as aforesaid.

4. That the Plaintiff, The American Oil Company, a corporation, do have and recover from the Defendants, P. G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, the sum of Eighty-Six Thousand One Hundred Eighty-One and 30/100ths (\$86,181.30) Dollars, Provided However, That this judgment shall not be satisfied out of the individual property of the said Defendants or either of them.

[fol. 538] 5. That the Defendants, P. G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, are hereby directed to refund and pay, or cause to be paid, to the Plaintiff, The American Oil Company, a corporation, the sum of \$86,181.30 hereby found to have been illegally and erroneously demanded and collected from the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, as motor fuels taxes upon the transactions set forth in the complaint and supplemental complaints on file herein, Provided However, That this judgment shall not be satisfied out of the individual property of the said Defendants or either of them.

Let Judgment be entered accordingly.

Dated This 20th day of October, 1961.

Merlin S. Young, District Judge.

Acknowledgment of service (omitted in printing).

[fol. 549]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

DECISION AND ORDER—November 10, 1961

Appearances:

For the plaintiff—Calvin Dworshak and Jay L. Webb;  
attorneys at law, Boise, Idaho.

For the defendants—Frank L. Benson, Attorney General for the State of Idaho.

This matter is before the Court upon motion by defendants to quash a writ of execution issued to enforce the summary judgment of this court entered October 9, 1961, and later amended on October 20, 1961.

Plaintiff's action is, in my opinion, basically an equitable action for the return or restitution of money wrongfully collected by and involuntarily paid to the State Tax Collector by plaintiff. This Court has held that the part of the statute under which the State Tax Collector acted, is unconstitutional and void as applied to the plaintiff in this action. The judgment finds that plaintiff is entitled to recover the amount of money paid as taxes and directs the named defendants to refund and pay, or cause to be paid, to plaintiff, the taxes erroneously collected.

The deposition and affidavits of the State Treasurer on file in this case affirmatively show that the tax moneys paid by plaintiff were, as paid, at the direction of the State Tax Collector, placed in a suspense fund by the State Treasurer. This was apparently done pursuant to Section 67-1209 I.C.

Because of this procedure I conclude that in effect the Tax Collector and State Treasurer, acting in their official capacities for the State, are trustees of plaintiff's funds so deposited, as is the State of Idaho. *Kittredge vs. Boyd*, 136 Kan. 691, 18 Pac. 2d 563. It follows then that the funds so [fol. 550] held are the private property of plaintiff and should be refunded to it by the officers involved. The claim of plaintiff is not against the defendants or the State as debtors, but as trustees. The funds involved are not public moneys in the sense that title or ownership has passed to the State.

Thus the grounds urged by defendants to quash the execution, all dealing with executions against "public money", are not valid.

It Is Therefore Ordered, And This Does Order, that defendants' motion to quash the writ of execution issued from this court on October 23, 1961 be, And The Same Is Denied.

Dated this 10th day of November, 1961.

Merlin S. Young, District Judge.

[fol. 568]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

NOTICE OF APPEAL—Filed December 8, 1961

To The American Oil Company, a Maryland corporation,  
the above-named plaintiff and To Calvin Dworshak, its attorney:

You, And Each Of You, Will Please Take Notice that the above-named defendants hereby appeal to the Supreme Court of the State of Idaho from the following judgments and orders:

1. That certain order denying defendants' motion to quash writ of execution, which order was made and entered and filed in the above-entitled Court and cause on the 10th day of November, 1961, in favor of the plaintiff and against the defendants, and from all of said order.



2. That certain amended summary judgment made and entered and filed in the above-entitled Court and cause on the 20th day of October, 1961, in favor of the plaintiff and against the defendants, and from all of said amended summary judgment.
3. That certain summary judgment made and entered and filed in the above-entitled Court and cause on the 9th day of October, 1961, in favor of the plaintiff and against the defendants, and from all of said summary judgment.
4. That certain order denying defendants' supplemental motion to dismiss, which order was made and entered and filed in the above-entitled Court and cause on the 9th day of October, 1961, in favor of the plaintiff and against the defendants, and from all of said order.
5. That certain order denying defendants' motion to dismiss plaintiff's motion for summary judgment, which order was made and entered and filed in the above-entitled Court and cause on the 9th day of October, 1961, in favor of the [fol. 569] plaintiff and against the defendants, and from all of said order.
6. That certain order denying defendants' motion to dismiss, which order was made and entered and filed in the above-entitled Court and cause on the 9th day of October, 1961, in favor of the plaintiff and against the defendants, and from all of said order.
7. That certain order granting plaintiff's motion for summary judgment, which order was made and entered and filed in the above-entitled Court and cause on the 9th day of October, 1961, in favor of the plaintiff and against the defendants, and from all of said order.

Dated this 8th day of December, 1961.

Frank L. Benson, Attorney General of Idaho, By Jim Christensen, Assistant Attorney General, Attorneys for Defendants, Residing at Boise, Idaho.

Acknowledgment of service (omitted in printing).

[fol. 570]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO

NOTICE OF APPEAL—Filed December 8, 1961

To the Defendants Above Named, P. G. Neill, Former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and to Their Attorneys of Record, Frank L. Benson, Esquire, Attorney General of the State of Idaho, Robert E. Bakes, Esquire, and Jim Christensen, Esquire, Assistant Attorneys General of the State of Idaho, and to the Clerk of the Above Entitled Court:

You, and Each of You, Will Please Take Notice That the Plaintiff, The American Oil Company, a corporation, does hereby appeal to the Supreme Court of the State of Idaho from those parts of the Amended Summary Judgment made and entered in the above entitled action, Civil No. 30025, by the above entitled Court on the 20th day of October, 1961, which parts of said judgment are as follows, to-wit:

A. That part of said judgment which denies to Plaintiff recovery of interest on the principal amount of \$86,181.30 at the legal rate in such cases as provided by law;

B. That part of paragraph 4 of said judgment which reads and provides:

"Provided However, That this judgment shall not be satisfied out of the individual property of the said Defendants or either of them.";

C. That part of paragraph 5 of said judgment which reads and provides:

"Provided, However, That this judgment shall not be [fol. 571] satisfied out of the individual property of the said Defendants or either of them.";

D. That part of said judgment which denies to Plaintiff recovery of its costs;

and from those parts of said judgment only.

You, and Each of You, Will Please Take Further Notice That the Plaintiff, The American Oil Company, a corporation, does hereby appeal to the Supreme Court of the State of Idaho from the order made and entered in the above entitled action, Civil No. 30025, by the above entitled Court on the 23rd day of October, 1961, retaxing the costs against the Plaintiff herein, and from the whole of said order.

You, and Each of You, Will Please Take Further Notice That the Plaintiff, the American Oil Company, a corporation, does hereby appeal to the Supreme Court of the State of Idaho from that part of the order made and entered in the above entitled action, Civil No. 30025, by the above entitled Court on the 20th day of October, 1961, which reads and provides as follows, to-wit:

"2. That paragraph 1 of the order entered herein upon the 9th day of October, 1961, be, and the same is hereby amended by adding at the end of said paragraph 1 thereof the following language:

"That the individual property of said Defendants shall in no way be liable for the satisfaction of any judgment entered in this action.'"

and from that part of said order only.

Dated This 8th day of December, 1961.

[fol. 572] Calvin Dworshak, Jay L. Webb, 326 Bank of Idaho Building, Boise, Idaho, Attorneys for Plaintiff.

Acknowledgment of service (omitted in printing).

[fol. 669]

IN THE SUPREME COURT OF THE STATE OF IDAHO  
THIRD DISTRICT

—  
Judge Merlin S. Young  
Ada County

—  
Calvin Dworshak  
Jay L. Webb

—  
No. 9113

—  
Frank L. Benson, Attorney General, Robert E. Bakes,  
Assistant Attorney General—WITHDRAWN,  
William M. Smith, Assistant Attorney General.

—  
THE AMERICAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent Cross-Appellant,

v.

P. G. NEILL, Former Tax Collector of the State of Idaho,  
and FLOYD WEST, Acting Tax Collector of the State of  
Idaho, Defendants-Appellants Cross-Respondents.

—  
DOCKET ENTRIES

Dec. 18, 1961 Filed Clerk's Certificate.  
April 3, 1962 Filed Transcript—2 Volumes (3).  
April 3, 1962 Received Exhibits.  
April 30, 1962 Filed Stipulation and Order substituting  
Floyd West for Vernon E. Drown (1).  
July 6, 1962 Filed Stipulation and Order extending Ap-  
pellants' time to July 31, 1962 to file brief  
and extending Respondent's time to Octo-  
ber 31, 1962.  
Sept. 11, 1962 Filed Stipulation to extend Appellants'  
time to 9-11-62 to file brief.

- Sept. 11, 1962 Filed Appellants' Brief (10). Affidavit of service.
- Sept. 17, 1962 Filed Order extending Appellants' time to 9-11-62 to file brief.
- Nov. 1, 1962 Filed Stipulation and Order extending Respondent's time to 11-1-62 to file brief.
- Nov. 1, 1962 Filed Respondent's Brief (10). Acknowledgment of service.
- Nov. 7, 1962 Filed Petition and Order of Robert E. Bakes for withdrawal of counsel, as attorney of record. Certificate of mailing.
- Nov. 28, 1962 Entered Order setting cause for oral argument on Merits, Thursday, December 13, 1962 at 9:00 a.m. Boise, Idaho.
- Dec. 13, 1962 Entered Order taking cause under advisement.
- June 20, 1963 Filed Opinion. Copies to Messrs: Young, Shepard, Smith and Dworshak.
- July 5, 1963 Filed Application for Stay of Remittitur and all Other Proceedings or Alternate Relief (6). Affidavit of Calvin Dworshak (6). Memorandum in Support of Respondent's Application for Stay of Remittitur and Other Relief (10). Acknowledgment of service.
- July 5, 1963 Filed Response for Application of Stay of Remittitur (6), Waiver of Reply to Response. Acknowledgment of service.
- July 8, 1963 Entered Order granting Respondent and Cross-Appellant's Application to Stay Execution of the Judgment on Remittitur until after Oct. 7, 1963, in order to enable Respondent and Cross-Appellant to apply to the Supreme Court of the United States of America for a Writ of Certiorari or to perfect an appeal of this cause to said Court. Notified counsel.

[fol. 670]

- July 11, 1963 Entered Judgment.
- July 11, 1963 Remittitur ) Via
- July 11, 1963 Returned Exhibits.) Deputy Clerk
- Oct. 4, 1963 Filed Respondent's Notice of Appeal to the Supreme Court of the United States (2). Acknowledgment of service.
- Oct. 4, 1963 Filed Respondent's Motion to Stay Enforcement of Judgment (6). Acknowledgment of service.
- Oct. 4, 1963 Filed Affidavit of Calvin Dworshak (2). Acknowledgment of service.
- Oct. 4, 1963 Entered Order that pending final disposition of Motion to Stay, in the event said Motion is denied then for an additional period of 10 days, the Tax Collector of the State of Idaho is restrained from transferring, withdrawing or doing any act affecting the monies paid under protest by American Oil Co., or its predecessor in interest and which are involved in this controversy; and that until further notice trial Court is directed to withhold dismissal of this action and in the event said motion is granted bond of respondent if any be required, shall be set by Court. Notified counsel.
- Oct. 4, 1963 Filed Proposed Order (5).
- Oct. 21, 1963 Entered Order granting Respondent's Motion to Stay Enforcement of Judgment to issue. Notified counsel.
- Oct. 21, 1963 Issued Order. Copies to Messrs: Dworshak, Webb, Shepard, Smith and Thomas.
- Oct. 23, 1963 Entered Order Clerk of Third District Court transmit copies of exhibits to this Court for United States Appeal.
- Nov. 8, 1963 Filed Respondent's Cost Bond (7).



[fol. 671]

[File endorsement omitted]

## IN THE SUPREME COURT OF THE STATE OF IDAHO

THE AMERACAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent and Cross-Appellant,

vs.

P. G. NEILL, Former Tax Collector of the State of Idaho,  
and FLOYD WEST, Tax Collector of the State of Idaho,  
Defendants-Appellants and Cross-Respondents.

ORDER SUBSTITUTING PARTY DEFENDANT  
—April 30, 1962

Upon the reading and filing of the Stipulation for Substitution of Party Defendant, dated the 30th day of April, 1962, and good cause appearing therefor, it is hereby

Ordered:

1. That Floyd West be, and he hereby is, substituted herein as a Defendant in the above entitled action as of the first day of March, 1962, in lieu and in place of Vernon E. Drown, deceased, for all purposes, and that said action be continued without prejudice to any prior proceedings, in the names of P. G. Neill, Former Tax Collector of the State of Idaho, and Floyd West, Tax Collector of the State of Idaho, and each of them as Parties Defendant.

2. That the Restraining Order entered herein upon the 25th day of November, 1961, be continued in full force and effect and shall be applicable to and binding upon the Defendant, Floyd West, pending a hearing on the petition of Plaintiff for an injunction; and that the said hearing [fol. 672] on the petition for an injunction be continued indefinitely subject to setting by the above entitled Court at the instance of any party to this action.

Dated this 30th day of April, 1962.

/s/ [Signature illegible] Justice.

[fol. 677]

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9113

Boise, November Term, 1962

THE AMERICAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent, and Cross-Appellant,

v.

P. G. NEILL, former Tax Collector of the State of Idaho,  
and FLOYD WEST, Acting Tax Collector of the State of  
Idaho, Defendants-Appellants and Cross-Respondents.

Appeal from the District Court of the Third Judicial Dis-  
trict, Ada County. Hon. Merlin S. Young, District Judge.

Action to recover Idaho Motor Fuel Tax moneys paid  
under protest. Summary judgment for plaintiff, *Reversed*,  
with directions to dismiss the action.

Frank L. Benson, Attorney General, and Wm. M.  
Smith, Assistant Attorney General, Boise, for  
Appellants and Cross-Respondents.

Calvin Dworshak and Jay L. Webb, Boise, for Re-  
spondent and Cross-Appellant.

OPINION—Filed June 20, 1963

McFADDEN, J.

This action, originally brought by Utah Oil Refining Com-  
pany, is to recover motor fuels tax payments made under  
protest to P. G. Neill, State Tax Collector. The payments  
were made during the period between January and Novem-  
ber, 1960, for motor fuels delivered between November 1,  
1959 and October 30, 1960. Subsequent to instituting the  
action The American Oil Company, as successor of Utah  
Oil Refining Company, was substituted as the plaintiff;

P. G. Neill resigned as Tax Collector of the State of Idaho, and Vernon Drown was appointed as acting Tax Collector [fol. 678] of the State; Mr. Drown died in office, and Floyd West, was later appointed as the Tax Collector of the State, and named herein as party defendant.

Defendant moved to dismiss the plaintiff's complaint; plaintiff moved for summary judgment, and defendant moved to dismiss the plaintiff's motion for summary judgment. The summary judgment was entered for the plaintiff in the principal amount prayed for, but without interest. The judgment provided, inter alia:

"That the Defendants, P. G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, are hereby directed to refund and pay, or cause to be paid, to the Plaintiff, the American Oil Company, a corporation, the sum of \$86,181.30 hereby found to have been illegally and erroneously demanded and collected from the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, as motor fuels taxes upon the transaction set forth in the complaint and supplemental complaints on file herein, PROVIDED HOWEVER, That this judgment shall not be satisfied out of the individual property of said Defendants or either of them."

Defendants appealed from the summary judgment and plaintiff cross appealed from that portion of the summary judgment refusing plaintiff any interest, from the portion thereof holding the defendants not personally liable, and denying plaintiff its costs;

The defendants' assignments are as follows:

1. The court erred in ruling and accordingly deciding that the federal commerce clause is involved, ruling that title to gasoline passed outside the State of Idaho and was imported into the State by its owner, on grounds and for the reasons that said ruling and holding is contrary to the evidence adduced and the law of the case.

"2: The court erred in ruling and accordingly holding that title 49, chapter 7 of the Idaho Code and particularly I. C. § 49-1201 as amended 1959 cannot be construed to impose a motor fuels tax upon appellant herein on account of its attempted passage of title outside of the state of *Utah* (sic), when in truth and in fact the parties intended to, and they did pass title within the State of Idaho, and therein use and consume the gasoline.

[fol. 679] "3. The court erred in ruling and accordingly holding that the Federal Government is the ultimate consumer and therefore sovereign immunity to taxation applies on grounds and for the reasons that such holding is contrary to the facts adduced and the law in such case made and provided."

Defendant summarize their position on this appeal by recital of the following two issues:

"1. In instances where the ultimate consumer is the Government of the United States of America, can the state impose a motor fuel tax?"

"2. Is the sovereign State of Idaho bound by the language of the contract or award between the respondent and the agent for the Atomic Energy Commission, or may this court view the transaction as a whole and determine by the actual conduct of the parties that title to the gasoline in question passed at Arco, Idaho rather than in Utah?"

In order to understand the position of the respective parties concerning these assignments of error, a rather detailed statement of the facts leading to this litigation is essential.

The Federal Government, acting through the Atomic Energy Commission (referred to as the A.E.C.) operates facilities at Idaho Falls, and at the National Reactor Testing Station northwest from Idaho Falls.

The Phillips Petroleum Company is a contractor with the A.E.C. and on its behalf actually performs certain required services, including the operation of busses between Idaho Falls, and the National Reactor Testing Station. The gaso-

line, the basis of the controverted tax, was consumed in motor vehicles owned by the Federal Government, and used in transporting personnel connected with the A.E.C. A fee was charged for the transportation of persons using the Government busses, which fee accrued to the use and benefit of the Government. Losses involved in operating the busses [fol. 680] were fully absorbed by the Government.

The Federal Government by the General Service Administration, a Federal agency, (sometimes referred to as G.S.A.) issued invitation for bids for supplying gasoline for activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959 through October 31, 1960. Included in this invitation (along with other items) were items Nos. 63 and 64 covering the needs for gasoline for the A.E.C., at Idaho Falls, and at the National Reactor Testing Station. Utah Oil Refining Company, submitted its formal bid on these items (with other bid items) to the General Service Administration office at Seattle, Washington.

On September 15, 1959, the G.S.A. accepted Utah Oil Refining Company's bid for listed items Nos. 63 and 64. In the bid as submitted, the bidder stated that the Idaho State tax of \$.06 per gallon was included in the bid. Both items Nos. 63 and 64 were submitted in alternative forms.

Item No. 63 was for 200,000 gallons of gasoline for Idaho Falls, with tank truck delivery quoted. The first alternative bid was as follows:

"(a) f.o.b. bulk plant posted price date of bid \$.1905  
Location of bulk plant Salt Lake City."

Under this alternate bid maximum price per gallon, after deductions was \$.1580 per gallon "Ex. State Tax." The other alternate was as follows:

"(b) f.o.b. activity, transport truck delivered price date of bid: \$.2755."

Under this alternate bid, the maximum price per gallon, after deductions was \$.2418 per gallon.

Item No. 64 was for 1,000,000 gallons of gasoline for the National Reactor site with identical alternates, except for [fol. 681] prices quoted.



The A.E.C. through its operating agent periodically placed orders under the contract for delivery of the gasoline at the bulk plant at Salt Lake City. Common carriers selected and paid by the A.E.C. transported the gasoline from Utah to government owned storage tanks in Idaho. Monthly thereafter Utah Oil Refining Company, submitted the reports required by I. C. §49-1210, and paid under protest to the State Tax Collector the \$.06 per gallon Motor Fuels Tax. Utah Oil Refining Company, a Delaware Corporation, authorized to do business in Idaho, was a licensed dealer as defined by the provisions of that chapter. The A.E.C. is not a licensed dealer. The status of Phillips Petroleum Company, as a licensed dealer, is immaterial to this decision, for its status is only that of a contractor of the A.E.C., at the Idaho Falls and National Reactor Testing station.

In 1933 the Legislature of Idaho enacted an excise tax on motor fuels, which act, later amended in subsequent legislative sessions is not contained in Chapter 12, Title 49, Idaho Code, with the "Special Fuel Use Tax Act" (S.L. 1953, Ch. 262). The 1933 act, as amended, fixes an excise tax on motor fuels. A "dealer" in motor fuels is defined as any person, (which includes individuals, firms, corporations, etc.), who first receives motor fuels in this state, as the term "received" is there defined.

All dealers are required to hold a permit by the State Tax Collector, issued upon application and posting of bond conditioned on compliance with the law. Such permit is required before any person can import, receive, use, sell or distribute motor fuels; non-compliance with the law subjects any persons to criminal penalties and civil liabilities.

[fol. 682] Each dealer is required to report monthly the gallonage of all motor fuels received for the preceding month, and to pay the \$.06 per gallon tax. Provisions are made for deductions from the gallonage reported for fuels exported, fuels sold or used in aircraft (which fuels bear a different tax), and fuels used in a non-highway activities, plus a 2% shrinkage allowance. The proceeds of the tax are paid by the Tax Collector to the State Treasurer for deposit



in the dedicated highway funds of the state, including a special fund to be used for payment of lawful refunds of the tax. Excepting for the fuels contained in the fuel tank of a vehicle, the act requires payment of the tax by the vehicle owner on all fuels imported into the state by motor vehicles, in the event of failure of the "dealer", or "individual" for whom the importation is made, to pay the tax.

By amendments to the 1933 act the excise tax becomes due when the motor fuel is "received" by a licensed dealer. The 1959 amendment (S. L. 1959, Ch. 75), here involved, provides:

"I.C. § 49-1201—Definitions.—

"(g) \* \* \* Motor Fuel, for the purpose of determining liability for the payment of the tax imposed by section 49-1210, shall be considered to be "received" in the following cases:

"1. ...

"2. Motor fuel imported into this state other than that placed in storage at refineries or pipe line terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time \* if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; further [fol. 683] *provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be re-*

*ceived by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel; immediately after the imported motor fuel has been unloaded in the state of Idaho. . . ."* (Emphasis added.)

Here the motor fuels on which the tax was paid were sold or supplied to an agency, not a holder of an uncanceled dealer permit, for importation into this state from Utah. These facts bring this action directly into the purview of the portion of the statute above underlined. The motor fuels sold, under the provisions of the act, must thus be considered to have been received by the Utah Oil Refining Company, for tax purposes, the moment the imported fuels were unloaded in the State of Idaho.

It must be pointed out that this section of the statute makes no distinction between the case where an Idaho dealer sells, inside the State, to an unlicensed person, from the case where he sells, supplies or furnishes the fuels to an unlicensed person for importation into the State. The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first-licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

It is contended by respondents, as pointed out by the trial court in its memorandum, that title to the gasoline passed from Utah Oil Refining Company to the A.E.C. at the bulk [fol. 684] plant in Salt Lake City. The trial court and respondent are correct in this conclusion. When title passes is a question of intention of the parties. Uniform Sales Act, §18; Utah Code Annotated § 62-2-2; Shipman v. Kloppenburg, 72 Idaho 321, 240 P.2d 1151; Union Portland Cement Co., v. State Tax Commission, (Utah), 170 P.2d 164, modified on rehearing on unrelated issue, 176 P.2d 879.

There is presented in this case the principal issue whether the statute in question impinges upon the Commerce Clause, (U. S. Const. Art. 1 § 8 (3), and upon the Due Process Clause of the Fourteenth Amendment. It is further con-

tended that the imposition of this tax violates the due process clause of Idaho Constitution, Art. 1 § 13. In considering these constitutional questions it is essential to bear in mind that the burden of showing unconstitutionality of a statute is upon the party asserting it, and the invalidity must be clearly shown. *Eberle v. Nielson*, 78 Idaho 572, 306 P.2d 1083; *Curtis v. Pfost*, 53 Idaho 1, 21 P.2d 73; *Boughton v. Price*, 70 Idaho 243; 215 P.2d 286; *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432; *Caesar v. Williams*, 84 Idaho 254, 371 P.2d 241. A legislative act is presumed to be constitutional and all reasonable doubt as to its constitutionality must be resolved in favor of its validity. *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 Pac. 32; *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P.2d 384; *Rich v. Williams*, *supra*; *Caesar v. Williams*, *supra*.

Plaintiff asserts that this tax cannot be sustained against the constitutional challenge on the theory that it is a "sales" tax, for the reason that the "sale" took place outside the state and a tax on it would violate the due process clause of the Federal Constitution, relying upon *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304. [fol. 685] Plaintiff also claims this tax cannot be sustained upon the theory that it is a "use" tax, for the "use" is by an agency of the Federal Government, immune from imposition of taxes by the State.

The legal issues raised by those contentions have been serious and difficult ones for the Supreme Court of the United States and have been the subject of numerous articles by legal writers. See: October 1960 issue of *Virginia Law Review*, (46 Va. Law Rev. pgs. 1051 et seq.). The Supreme Court has discussed the basic problem of the commerce clause in these words:

"The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166; 74 S.Ct. 396, 98 L.Ed. 583.

"Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports." *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 457; 79 S. Ct. 357, 3 L. Ed. 2d 421.

Paul J. Hartman, Professor of Law, Vanderbilt University, in his article, "State Taxation of Interstate Commerce," 46 Va. Law Review, 1051, at page 1059, in discussing the effect of the due process clause states:

[fol. 686] "... The restraining power of the due process clause, it might be said, keeps the taxing power at home. It prevents a state from fixing its tax talons on extra-territorial values. The absence of any sufficient 'nexus' or connection in fact between the taxed business and the taxing state would be enough in itself for upsetting a tax on due process grounds. The term 'nexus' has become an indispensable part of the tax vocabulary, when reference is to the requisites of the due process clause as applied to state and local taxation of multistate operations. Consistent with these nexus requirements a state can exert its taxing power only in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred..." (*Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267.)

In *McLeod v. J. E. Dilworth Co.*, *supra*, the Supreme Court struck down as unconstitutional the Arkansas sales

tax when applied to an order solicited by a drummer for a Tennessee company. It was held that Arkansas could not collect a sales tax when the order was solicited by a drummer in that state for acceptance in Tennessee by the seller, who then shipped the goods directly to the Arkansas buyer, title passing in Tennessee. The court agreed that a sales tax might have the same result as a use tax, but rejected the argument that the sales tax could be sustained because the seller would have been required to pay a use tax to Arkansas. In discussing the distinction between a "sales" tax and a "use" tax, the court stated:

"A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation, of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by [fol. 687] a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. \*That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

"The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: 'A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself.' *Henneford v. Silas Mason Co.*, 300 US 577, 583, 81 L.ed 814, 819, 57 S Ct 524. Thus we are not dealing with matters of nomenclature



even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' *Wagner v. Covington*, 251 US 95, 102, 64 L.ed 157, 167, 40 S Ct 93. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State."

The distinction between these two types of tax as discussed by the majority opinion in *McLeod v. J. E. Dilworth Co.*, supra, was rejected by Mr. Justice Douglas in his dissenting opinion in that case, where he stated:

"It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. *Henneford v. Silas Mason Co.*, 300 US 577, 81 L.ed 814, 57 S Ct. 524. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence."

It is noteworthy that the same day the opinion in *McLeod v. J. E. Dilworth Co.* (supra) was announced, the Supreme Court of the United States rendered its opinion in *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 64 S. Ct. 1028, 88 L.ed 1309. The majority opinion in both of these cases was written by Mr. Justice Frankfurter. The end [fol. 688] result of these two cases was that insofar as the imposition of a use tax was concerned when imposed in a business involved in interstate commerce, such was not unconstitutional as being discriminatory against interstate commerce, or contrary to the due process provision, but that a sales tax would be.

In *General Trading Co. v. State Tax Comm'n* (supra) the Iowa Tax Commission brought suit in an Iowa court against *General Trading Co.*, for taxes assessed under the



Iowa use tax law with respect to tangible personal property sold and delivered to Iowa "users" of the property. General Trading was a Minnesota corporation, and had not qualified to do business, and did not maintain any office, branch or warehouse, in Iowa. The property in respect of which the use tax was levied was sent to Iowa in response to orders solicited and obtained by salesmen traveling into Iowa from their Minnesota headquarters. The orders were subject to acceptance in Minnesota, after which the goods were sent to Iowa by common carrier. As stated above, the Supreme Court held such tax did not violate the federal constitution, although it again reiterated that "... no State can tax the privilege of doing interstate business. ... That is within the protection of the Commerce Clause and subject to the power of Congress."

Mr. Justice Rutledge specially concurred in *General Trading Co. v. State Tax Comm'n*, supra, and in *International Harvester Co. vs. Department of Treasury*, 322 U.S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (opinion being rendered the same day) and dissented in *McLeod v. J. E. Dilworth*, supra. In his special opinion discussing these cases, he points out with clarity the danger of categorizing of any one type of tax as "sales" or "use", as follows:

[fol. 689] "The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

"It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer;

and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes placed upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. Cf. e.g., *Western U. Teleg. Co. v. Kansas*, 216 US 1, 54 L ed 355, 30 S Ct. 190. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue'. But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

"'Thus,' in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state, the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its [fol. 690] force. In the *General Trading Co. Case* it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state.' The Iowa Supreme Court sus-

tains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other."

In discussing the effect of the commerce clause of the Federal Constitution, Justice Rutledge points out:

"When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. (citing cases). Nor may it discriminate against interstate commerce and in favor of its local trade. (citing cases). Again, the state may not impose cumulative burdens upon interstate trade or commerce. (citing cases). Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden

than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special."

[fol. 691] The Supreme Court of the United States subsequently was presented with a similar problem in *Miller Bros. v. Maryland*, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744. That case involved taxation of Miller Bros., a Delaware corporation, under a Maryland "use" tax.

The corporation operated a store in Delaware; some of its Maryland customers came to Delaware, made their purchases and took the purchases home. In some cases the purchases were delivered to the Maryland customers by common carrier. Miller Bros. advertised in Delaware newspapers and radio stations, and also mailed sales circulars to its customers, including the Maryland residents. Upon failure of the corporation to collect and remit the Maryland use tax on its sales to Maryland customers and, seeking to enforce this obligation, the state of Maryland attached one of the Miller Bros.' delivery trucks. The Supreme Court held the tax invalid. In reconciling this result\* with the *General Trading Company* case the Court through Mr. Justice Jackson, stated:

".... But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here."

Justice Douglas' dissenting opinion in *McLeod v. J. E. Dilworth Co.*, *supra*, and Justice Rutledge's special opinion wherein he concurred in *General Trading Co. v. State Tax Comm'n*, and *International Harvester Co. v. Department [fol. 692] of Treasury*, and also dissented in *McLeod v. J. E. Dilworth*, are quoted from at length herein; because in our opinion the basic judicial philosophy disclosed therein became the rationale of the Supreme Court's later opinion in *Scripto, Inc. v. Carson*, hereinafter discussed.

Again a similar problem was presented the Supreme Court in *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S. Ct. 619; 5 L. Ed 2d 660. In that case, a Georgia corporation, having no office, distributing warehouse, or other place of business in Florida, and having no bank account, stock of goods, regular employees or agents in or salesman traveling into Florida, shipped merchandise, f.o.b. Atlanta, to Florida customers, pursuant to orders solicited by Florida wholesalers or jobbers. The wholesalers or jobbers were independent contractors working on a commission basis, with no authority to make collections on behalf of *Scripto, Inc.*

The majority opinion, in reconciling the holding with *Miller Bros. v. Maryland*, *supra*, stated:

"Appellant earnestly contends that *Miller Bros. Co. v. Maryland*, *supra*, is to the contrary. We think not; Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like. But on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. This led the court



to conclude that Miller would be made 'more vulnerable to liability for another's tax than to a tax on itself.' 347 US at 346. In view of these considerations, we conclude that the 'minimum connections' not present in Miller are more than sufficient here."

Here we are dealing with an excise tax, the purpose of [fol. 693] which is to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state. *Union Pac. R. R. Co. v. Riggs*, 66 Idaho 677, 166 P.2d 926. *State v. Boise City*, 57 Idaho 507, 66 P.2d 1016. The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the "dealers" as that term is defined by the statute. The relationship between the State of Idaho, Utah Oil Refining Company, and this tax is more than a casual connection. The gasoline, the subject of the tax, was for use in Idaho. Utah Oil Refining Company, a Delaware corporation, subjected itself to the jurisdiction and control of the state of Idaho, when it became authorized to do business herein, and additionally so when it applied for and was granted a "dealer's" permit authorizing it to enter into the Idaho market as a distributor of motor fuels,—authorizing it to engage in the very activity it now claims is exempt from the tax.

These connections between Utah Oil Refining Company, and the state of Idaho, or the "nexus" are more than incidental. The contract itself, between that oil company and General Service Administration, by the bid items Nos. 63 and 64, was phrased in the alternate for delivery of the gasoline either at the facility or at the bulk plant.

The line of demarcation between the cases where sufficient nexus is found to uphold a particular tax, and the cases of such insufficiency of nexus as to invalidate a tax on constitutional grounds, is a tenuous and intangible one. Here, [fol. 694] this connection is more substantial and evident than that found in the case of *Scripto, Inc. vs. Carson*, supra; it cannot be said this tax violates the due process clause of either the United States or the Idaho constitutions.



In *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed 267, the Supreme Court of the United States, speaking through Justice Frankfurter, stated:

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

"... That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. \* \* \*"

In the case at bar it is difficult to discern a clear violation of the commerce clause of the Federal Constitution. The inhibition against imposition of a tax upon interstate commerce is not as to the tax itself, but only when the tax becomes an undue burden upon interstate commerce, or when it discriminates against the out of state, as compared to the intrastate vendor. *Halliburton Oil Company, Well* [fol. 695] *Cementing Co. v. Reily* (U.S. Sup. Ct. May 13, 1963), — U.S. —, — S. Ct. —, — L. Ed. —.

It cannot be said that there is any discrimination between Utah Oil Refining Company as compared to a local "dealer"; both are subject to an identical tax burden as it relates to the importation, receiving or sale of gasoline. No undue burden on interstate commerce is disclosed by this tax; therefore it is not in violation of the commerce clause of the Federal Constitution. *Scripto Inc. v. Carson* (supra), *General Trading Co. v. State Tax Commission* (supra).

This appeal presents one remaining issue. Plaintiff asserts that the incidence or burden of this tax falls on an agency of the Federal Government, and hence it cannot be levied against Utah Oil Refining Company, as vendor of the gasoline to the Atomic Energy Commission. *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed 3, 140 A.L.R. 615, held that the constitutional immunity of the United States from state taxation was not infringed by the exaction of a state sales tax, with which the seller is chargeable but which he is required to collect from the buyer, in respect of materials purchased by a contractor with the United States on a cost plus basis. This was held to be true notwithstanding that under the contract the title to such materials was in the United States on shipment by the seller. In a series of three cases, the Supreme Court of the United States ruled that a Michigan state statute, authorizing taxation of property of the Federal Government held by a private party and used in fulfilling governmental contracts, was not unconstitutional. *U.S. v. City of Detroit*, 355 U.S. 466, 78 Sup. Ct. 474, 2 L. Ed. 2d 424; *U.S. vs. Muskegon*, 355 U.S. 484, 78 Sup. Ct. 483, 2 L. Ed. 2d 436; *Detroit v. Murray Corp.*, 355 U.S. 489, 78 S. Ct. 458, 2 L. Ed 2d 441. In *United States v. City of Detroit*, supra, it was stated:

[fol. 696] "This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 6 S. Ct. 670, 29 L. Ed. 845. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with

whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. See, e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155; *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927; *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3. \* \* \*

We therefore conclude that the tax immunity of the Atomic Energy Commission, if such there be, does not extend to the contractor furnishing the supplies. See: *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 73 S. Ct. 800, 97 L. Ed. 1174; *Alabama v. King & Boozer*, supra; *U.S. v. Detroit*, supra; *U.S. v. Muskegon*, supra; *Detroit v. Murray Corp.*, supra.

The summary judgment of the trial court is reversed and the trial court is instructed to dismiss the action.

Costs to appellant.

Knudson, C.J., McQuade, Taylor, JJ., and Dunlap, D.J., concur.

[fol. 698]

## IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9113

THE AMERICAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent, and Cross-Appellant,

v.

P. G. NEILL, former Tax Collector of the State of Idaho, and  
FLOYD WEST, Acting Tax Collector of the State of Idaho,  
Defendants-Appellants, and Cross-Respondents.

## ORDER DIRECTING WITHHOLDING DISMISSAL OF ACTION

July 11, 1963

Justice McFadden announced the decision in this cause June 20, 1963, that the judgment of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, is reversed and the trial court is instructed to dismiss the action.

Subsequent to the announcement of this decision the Court regularly granted Respondent and Cross-Appellant's application to stay execution of the judgment on remittitur until after October 7, 1963, in order to enable Respondent and Cross-Appellant to apply to the Supreme Court of the United States of America for a Writ of Certiorari or to perfect an appeal of this cause to said Court.

The trial court is therefore directed to withhold dismissal of this action until October 7, 1963. Costs to appellants.

It Is Now Therefore So Ordered.

Knudson, C.J., McQuade, Taylor, JJ., and Dunlap, D.J.  
concur.

July 11, 1963

[fol. 699]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF IDAHO  
No. 9113

THE AMERICAN OIL COMPANY, a Maryland corporation,  
Plaintiff-Respondent, and Cross-Appellant,

v.

P. G. NEILL, former Tax Collector of the State of Idaho, and  
FLOYD WEST, Acting Tax Collector of the State of Idaho,  
Defendants-Appellants, and Cross-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed October 4, 1963

I. Notice is hereby given that the American Oil Company, the Plaintiff-Respondent and Cross-Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho entered in this action on the 11th day of July, 1963, reversing the summary judgment of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, and instructing the trial court to dismiss the action.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

II. The Clerk will please prepare a certified transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 700] A) Transcript of the entire record (including all exhibits) as filed in the Supreme Court of the State of Idaho from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada;

B) Order dated and filed April 30, 1962, in the Supreme Court of the State of Idaho, substituting Party Defendant;



C) Appellant's brief filed in the Supreme Court of the State of Idaho on September 11, 1962;

D) Respondent's brief filed in the Supreme Court of the State of Idaho on November 1, 1962;

E) Opinion and Decision of the Supreme Court of the State of Idaho filed June 20, 1963;

F) Judgment of the Supreme Court of the State of Idaho entered July 11, 1963;

G) Remittitur filed July 11, 1963;

H) Minutes of proceedings in Supreme Court of the State of Idaho in this action;

I) List of Docket entries in the Supreme Court of the State of Idaho in this action;

J) This Notice of Appeal and proof of service thereof;

K) The Clerk's certificate of record.

III. The following question is presented by this appeal:

Is the Idaho Motor Fuels Tax (Title 49, Chapter 12, Idaho Code, as amended) unconstitutional as applied to gasoline sold and delivered outside of Idaho to the United States by a foreign corporation licensed to engage in business in Idaho as a dealer in motor fuel, which foreign corporation has no connection whatsoever with the gasoline when it is thereafter brought into Idaho by the United States and there used for governmental purposes, because:

[fol. 701] A) Imposition of the tax on the seller is repugnant to the commerce clause, Article I, Section 8 of the Federal Constitution, in that it constitutes a prohibited burden on interstate commerce; and

B) It is repugnant to the due process clause of Amendment XIV to the Federal Constitution, in that there is insufficient nexus to give Idaho jurisdiction to tax or make a tax collector of the seller; and

C) It is repugnant to the supremacy clause of Article VI of the Federal Constitution and infringes the immunity



from state taxation which the United States enjoys thereunder, in that, among other things, the act is especially aimed at and designed to apply to out of state purchases of gasoline made by the United States; and in practical operation is a tax on the use by the United States of its own property.

Calvin Dworshak, Attorney for The American Oil Company, Plaintiff-Respondent and Cross-Appellant, P. O. Box 737, Suite 326, Simplot Building, Boise, Idaho.

Acknowledgment of service (omitted in printing).

[fol. 711]. Clerk's Certificate to foregoing transcript. (omitted in printing).

[fol. 712]

SUPREME COURT OF THE UNITED STATES  
No. 701—October Term, 1963

THE AMERICAN OIL COMPANY, Appellant,

vs.

P. G. NEILL, et al.

Appeal from the Supreme Court of the State of Idaho.

ORDER NOTING PROBABLE JURISDICTION—June 8, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

## INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	3
Statement.....	3
1. The transactions.....	3
2. The Idaho Motor Fuels Tax Act.....	4
3. The State Court decisions.....	5
The question is substantial.....	6
Conclusion.....	15
Appendix A.....	1a
Appendix B.....	35a

## CITATIONS

### Cases:

<i>Adams Mfg. Co. v. Storen</i> , 304 U.S. 307.....	2, 12
<i>Atl. &amp; Pac. Tea Co. v. Grosjean</i> , 301 U.S. 412, .....	9
<i>Connecticut General Co. v. Johnson</i> , 303 U.S. .....	
77.....	2, 7
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577.....	11
<i>Kern-Limerick, Inc. v. Scurlock</i> , 347 U.S. 110.....	2, 14
<i>McCulloch v. Maryland</i> , 4 Wheat. 315.....	7-8
<i>McGoldrick v. Berwind-White Co.</i> , 309 U.S. 33.....	11
<i>McGoldrick v. Felt &amp; Tarrant Co.</i> , 309 U.S. .....	
70.....	11
<i>McLeod v. Dilworth Co.</i> , 322 U.S. 327.....	12
<i>Norton Co. v. Dept. of Revenue</i> , 340 U.S. 534.....	7, 10, 12
<i>Robbins v. Shelby Taxing District</i> , 120 U.S. .....	
489.....	7, 10
<i>Scripto v. Carson</i> , 362 U.S. 207.....	13

Cases—Continued

<i>Spector Motor Service v. O'Connor</i> , 340 U.S. 602.....	Page 7, 10
<i>Union Transit Co. v. Kentucky</i> , 199 U.S. 194.....	7, 8
<i>United States v. Allegheny County</i> , 322 U.S. 174.....	8, 14
<i>United States v. City of Detroit</i> , 355 U.S. 466.....	8
<i>United States v. Livingston</i> , 179 F. Supp. 9, affirmed, 364 U.S. 281.....	14
<i>Western Union Tel. Co. v. Kansas</i> , 216 U.S. 1.....	12

Constitution and statute:

Constitution of the United States:

Article I, Section 8 (Commerce Clause).....	3, 6, 7
Article VI (Supremacy Clause).....	3, 7, 14
Fourteenth Amendment (Due Process Clause).....	3, 6, 7, 8

Motor fuels, Tax Act, as amended, 9 Idaho Code 49-1201 *et seq.* (1963 Cum. Pocket Supp.).....

Sec. 49-1201.....	2, 35a
Sec. 49-1201.....	4, 5, 35a
Sec. 49-1202 (1957 ed.).....	37a
Sec. 49-1210.....	4, 37a
Sec. 49-1218.....	37a

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT AND  
THE UNITED STATES OF AMERICA AS AMICUS CURIAE

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho (Appendix A, *infra*, pp. 1a-23a) is reported at 383 P. 2d 350. The memorandum opinion of the District Court of the Third Judicial District of Idaho (Appendix A, *infra*, pp. 23a-33a) is not reported.

## JURISDICTION

Appellant brought this action for refund of taxes paid under protest on motor fuel sold to the Atomic Energy Commission. Appellant alleged that the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code 49-1201 *et seq.*) under which the taxes were imposed

is repugnant to the United States Constitution. The Supreme Court of the State of Idaho upheld the statute.

The judgment below was entered on July 11, 1963 (App. A, *infra*, p. 34a). Notice of appeal was filed in the State Supreme Court on October 4, 1963 (R. 699).<sup>1</sup> On November 29, 1963, that court extended the time for docketing the appeal to December 24, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101. *Connecticut General Co. v. Johnson*, 303 U.S. 77; *Adams Mfg. Co. v. Storen*, 304 U.S. 307; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110.

This jurisdictional statement and any subsequent briefs will be filed jointly by the appellant and the United States<sup>2</sup> as *amicus curiae*. If the Court notes probable jurisdiction, appellant's time for oral argument will be used by the United States, with consent of counsel for appellant.

#### QUESTION PRESENTED

Whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the State for importation into the State by the United States, the State of Idaho may constitutionally impose an excise tax upon the transaction on the theory that

<sup>1</sup> Record references are to the typewritten record which is being filed with this jurisdictional statement.

<sup>2</sup> Appellant's contract for the supply of gasoline for the Atomic Energy Commission provides that the price is to be increased for any state taxes imposed (R. 346).



the dealer constructively "receives" the gasoline in Idaho upon its importation by the United States.

#### STATUTE INVOLVED

The relevant portions of the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code 49-1201 *et seq.*) are set forth in Appendix B, *infra*, pp. 35a-38a.

#### STATEMENT

Utah Oil Refining Company<sup>3</sup> brought this action for refund of \$86,181.30 representing payments to the State Tax Collector of Idaho under the Idaho Motor Fuels Tax Act. The payments were made under protest on grounds that application of the Tax Act to an out-of-state sale and delivery of gasoline to the Atomic Energy Commission is unconstitutional because it violates (1) the Due Process Clause of the Fourteenth Amendment, (2) the Commerce Clause and (3) the Supremacy Clause (App. A, *infra*, pp. 26a-27a).

#### 1. THE TRANSACTIONS

The General Services Administration issued an invitation for bids for the supplying of gasoline for government activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959, through October 31, 1960. The invitation included as items 63 and 64 the supplying of gasoline for AEC activities at Idaho Falls, Idaho. Appellant sub-

<sup>3</sup> American Oil Company, as successor to Utah Oil Refining Company, was substituted as party plaintiff (App. A, *infra*, p. 1a).



4

mitted formal bids to the GSA office at Seattle from its principal offices at Salt Lake City, Utah (R. 221-222), and its bids on items 63 and 64 were accepted in Seattle. Each bid was submitted in alternative form, quoting a price f.o.b. Salt Lake City and a price f.o.b. the AEC activity site in Idaho, and the contract awarded was for delivery f.o.b. Utah's bulk plant Salt Lake City (App. A, *infra*, pp. 25a-26a). The contract price did not include state taxes (R. 260) but was to be increased for any state taxes imposed (R. 346). Pursuant to orders of the AEC under the contract, appellant delivered some 1,436,355 gallons of gasoline at its bulk plant in Utah. Common carriers selected and paid by AEC transported the gasoline from Utah to government owned storage tanks in Idaho (App. A, *infra*, p. 26a). Title to the gasoline passed to the AEC at the bulk plant in Salt Lake City (App. A, *infra*, p. 8a).

## 2. THE IDAHO MOTOR FUELS TAX ACT

The Idaho Motor Fuels Tax Act imposes an excise tax of six cents per gallon on motor fuels. The tax is to be paid by the "dealer," who is defined by the Act as any person who first "receives" motor fuels in Idaho within the meaning of the term "received" as defined in the Act (9 Idaho Code 49-1201, 49-1210, App. B, *infra*, pp. 35a, 37a). The definition of "received" (9 Idaho Code 49-1201, as amended), provides *inter alia*—

that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled

Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.

The dealer is not required to pass on the tax or collect it from the person to whom he sells the fuel or from the ultimate consumer (App. A, *infra*, p. 29a).

Pursuant to this amended provision, the Idaho Tax Collector demanded that appellant, an out-of-state corporation holding a license as a "dealer" under the Idaho Tax Act, pay the motor fuels tax on its sales of gasoline in Utah to the AEC.\* The Company paid the taxes under protest, and instituted this action for refund (App. A, *infra*, p. 1a).

### 3. THE STATE COURT DECISIONS

The District Court of the Third Judicial District of the State of Idaho granted summary judgment for the appellant, holding that the tax is not a use tax, but rather "is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the state \* \* \*"; that the taxable event is the "receipt" of the gasoline by the dealer; that under the facts of this case the tax is one on a privilege which was exercised and performed wholly

\*AEC was not, during the period in question, and never has been, the holder of an uncanceled Idaho dealer permit.

outside of the State of Idaho; and that as such its imposition is a violation of the Commerce Clause and Due Process Clause (App. A, *infra*, pp. 29a-31a).

On appeal, the Supreme Court of Idaho reversed, stating (App. A, *infra*, pp. 7a-8a)—

The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

The Court held that the requirements of the Commerce and Due Process Clauses were satisfied by (1) the fact that the appellant had subjected itself to the jurisdiction and control of the State of Idaho when it became authorized to do business there, and additionally when it became an Idaho "dealer," and (2) the fact that the gasoline was intended for use in Idaho (App. A, *infra*, p. 19a).

#### THE QUESTION IS SUBSTANTIAL

This appeal presents the question whether Idaho may constitutionally impose an excise tax upon an out-of-state transfer of gasoline where the State's only relationship to the transaction is as follows: the vendor is authorized to do business in Idaho and holds a license from the State as a "dealer" in motor

fuels; and the vendee, an official agency of the United States, carries on activities in Idaho and purchased the gasoline for subsequent shipment into Idaho. We submit that the Supreme Court of Idaho erred in holding that the tax is constitutional.

Under the Due Process Clause of the Fourteenth Amendment, a State has no power to tax transactions which occur outside its borders. *Union Transit Co. v. Kentucky*, 199 U.S. 194; *Connecticut General Co. v. Johnson*, 303 U.S. 77. Idaho has attempted to avoid this bar and to turn an obviously out-of-state transaction into an intrastate one by assumption of a completely fictitious state of facts. Although motor fuel was sold and delivered by appellant outside the State, Idaho's Tax Act deems that the appellant "received" the gasoline inside Idaho upon its importation by the United States. Clearly, the State Supreme Court should have rejected the fiction and recognized the tax for what it is—a prohibited tax on an out-of-state transaction. Nor may the tax be sustained as a tax upon the licensed dealer's privilege of controlling the importation of gasoline into Idaho. This would be a tax upon the privilege of engaging in interstate commerce, forbidden by the Commerce Clause. *Robbins v. Shelby Taxing District*, 120 U.S. 489; *Spector Motor Service v. O'Connor*, 340 U.S. 602; *Norton Co. v. Dept. of Revenue*, 340 U.S. 534. On the other hand, if the tax is one upon the use of the gasoline inside Idaho with the "dealer" serving merely as a collector, it is invalid under the Supremacy Clause as a direct tax on the United States. *Mc-*

*Culloch v. Maryland*, 4 Wheat. 316. See *United States v. Allegheny County*, 322 U.S. 174, and cf., *United States v. City of Detroit*, 355 U.S. 466.

1. It is well settled that the Due Process Clause of the Fourteenth Amendment forbids a State to tax activities which occur outside its borders. *Union Transit Co. v. Kentucky*, 199 U.S. 194. The appellant's transfer of gasoline to the AEC was clearly an out-of-state transaction with respect to Idaho. Each and every activity by the appellant necessary to the transaction occurred outside Idaho: invitations for bids were issued in Seattle, Washington; appellant submitted its bids from Salt Lake City to Seattle and they were accepted in Seattle; the contract was for delivery of the gasoline f.o.b. Salt Lake City; and, appellant delivered the gasoline and relinquished title to the AEC at ~~the latter's~~ <sup>appellant's</sup> bulk plant in that city. Appellant did not perform a single act, in the course of soliciting, consummating or performing the contract of sale which took place inside Idaho or which was dependent in any degree on the grace of that State.

Thus, the Due Process Clause appears to bar imposition of the tax unless there are some other local incidents of the transaction which bring it within Idaho's taxing power. The court below found such incidents in the following facts:

- (1) That the appellant had been authorized to do business in the State of Idaho and had applied for and been granted a dealer's permit "to con-



trol the distribution of the motor fuels throughout the state"; and

- (2) That the appellant had sold the gasoline for importation by the AEC into Idaho.

In our judgment these facts do not afford any basis for sustaining Idaho's contention that this out-of-state transaction is subject to its taxing powers.

The fact that appellant was licensed by Idaho as a dealer in motor fuels and authorized to do business in the State has no logical relationship to this particular transaction. Indeed, appellant—the Utah Oil Company at the time of the transaction—customarily did business in Utah and made deliveries, as it did here, at its bulk plant in Salt Lake City. Thus, the initiation and completion of the transaction in Utah was in no sense out-of-the-ordinary. Moreover, appellant did not need an authorization from Idaho to engage in the transfer, and Idaho could not have conditioned importation by the United States upon purchase from a licensed dealer.<sup>5</sup> Although appellant happened to hold an Idaho dealer's permit, there were Utah distributors which did not. Had the United States chosen to purchase its gasoline from one of these concerns, Idaho would have had no claim to a tax under its Act, yet the fundamental relationship to the transaction would have been no different than here. The obvious competitive advantage afforded such concerns

<sup>5</sup> See *Atlantic & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424, where the Court stated:

"The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. \* \* \*"



serves to underscore the government's point that the Idaho tax imposes an undue burden upon the out-of-state operations of appellant and all other dealers licensed in Idaho.

2. The fact that the appellant supplied the gasoline for subsequent importation into Idaho and that the tax was imposed only upon the occasion of such importation does not validate the tax, as the Supreme Court of Idaho concluded. The attempt to justify the tax on this ground merely emphasizes what is clear from the wording of the statute and its application in the circumstances of this case, that the tax falls directly on interstate commerce. It is well established that a direct tax on an interstate transaction or on the privilege of engaging in such a transaction is unconstitutional as a burden on the flow of commerce between the states. *Robbins v. Shelby Taxing District*, 120 U.S. 489; *Spector Motor Service v. O'Connor*, 340 U.S. 602; *Norton Co. v. Dept. of Revenue*, 340 U.S. 534.

Thus, the provision of the Idaho Tax Act at issue here imposes an excise tax of six cents per gallon upon licensed Idaho dealers in motor fuel who sell such fuel to unlicensed persons for importation into Idaho. In upholding the constitutionality of the tax, the State Supreme Court held (App. A, *infra*, p. 19a)—

The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the “dealers” \* \* \*

Since in fact the tax is one on a dealer who sells fuel outside the State for shipment into the State, a more accurate description would be that the tax is on the privilege of controlling importation of motor fuels into the State—i.e., it taxes the right to control fuel outside the State in such a manner as to introduce it into the stream of commerce between the State of sale and the State of Idaho. As the Idaho District Court held, this is an unconstitutional attempt to tax the privilege of doing interstate business (App. A, *infra*, p. 31a).\*

The fact that a vendor is authorized or licensed to do intrastate business—and is therefore subject to the taxing power of the State—has never been held to afford a basis for the State to exact a tax upon the vendor's interstate operations. The Court made

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\* Where this Court has upheld taxes on in-shipments from a point outside the taxing State, it has been because the direct burden of the levy was laid on some incident, activity or use within the taxing State. Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577; *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, and *McGoldrick v. Felt & Tarrant Co.*, 309 U.S. 70. In each of the latter cases, the Court approved a New York City sales tax imposed upon out-of-state vendors who delivered the subject goods to the buyer within the jurisdictional confines of the city. The Court said (309 U.S. at 43-44):

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast upon him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession. \* \* \*

this clear in *Adams Mfg. Co. v. Storen*, 304 U.S. 307. In that case, Indiana sought to impose a gross income tax on a domiciliary corporation with its headquarters, factory and principal place of business in that State but which shipped 80 percent of its goods to out-of-state buyers. This Court held the tax invalid as applied, stating (p. 311):

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. \* \* \*

Where a taxpayer is engaged in both interstate and intrastate business, it is not subject to direct taxation of its interstate activities. *Norton Co. v. Dept. of Revenue*, 340 U.S. 534. See also *McLeod v. Dilworth Co.*, 322 U.S. 327.

To uphold this tax on the ground that appellant had been granted a dealer's permit to distribute motor fuels throughout Idaho would in effect permit a State to tax a company's out-of-state business as a cost of doing intrastate business. This is virtually the identical evil which was condemned in *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, where a State franchise tax measured in part by the value of the taxpayer's prop-

erty outside the State was held to be a direct burden on the company's interstate operations.

*Scripto v. Carson*, 362 U.S. 207, upon which the court below placed primary reliance (App. A, *infra*, pp. 20a, 21a), does not sustain the tax. There, a Georgia corporation with no place of business in Florida and no property or regular full-time employees in that State had 10 wholesalers or jobbers who solicited sales of its products on a commission basis. Orders were forwarded to Georgia where they were accepted and goods were shipped from Georgia to Florida residents. The Court held that the Florida tax on the use of these products in Florida was not repugnant to the Commerce Clause or the Due Process Clause even though it made the Georgia corporation responsible for tax collection from the Florida purchasers. However, the holding in *Scripto* is inapplicable here for several reasons: (a) In *Scripto* the State of Florida had a direct connection with the sales transactions since 10 wholesalers or jobbers were continuously soliciting in Florida. Here the sale was made and title passed outside Idaho, and the transaction was not the result of solicitation in Idaho or dependent in any other respect upon happenings in Idaho; (b) In *Scripto* the Georgia dealer was charged with no tax except when he failed to collect from his Florida customers; here the incidence of the tax is wholly upon the dealer who, as the district court recognized, is not taxed as a collector; (c) In *Scripto*, the tax was imposed on the use of the goods in Florida; here the tax could not be sustained as a use tax as the only user is the AEC.

3. If the tax is a use tax for which the dealer serves merely as collector, as the opinion of the State Supreme Court suggests, it is invalid as a direct tax on the United States. Since the United States held title to the gasoline at all times in the State and was the user, a use tax would be invalid under the Supremacy Clause as a direct tax upon use of its own property by the United States. *United States v. Allegheny County*, 322 U.S. 174; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110; *United States v. Livingston*, 179 F. Supp. 9 (E.D. S.C.), affirmed, 364 U.S. 281.

In conclusion, Idaho cannot tax the sale of the gasoline, since that took place in Utah; Idaho cannot tax the use of the gasoline, since that use was by the United States; Idaho cannot tax the receipt of the gasoline, since it was the United States and the United States only which received it in Idaho. Nor can Idaho tax the fuel by means of a transparent fiction that the fuel was "received" upon being unloaded in Idaho by the seller, whose actual last connection with the fuel was its delivery to the United States in Utah.

'The Supreme Court stated (App. A, *infra*, p. 19a):

"Here we are dealing with an excise tax, the purpose of which is to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state. \* \* \* The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' as that term is defined by the statute. \* \* \* The gasoline, the subject of the tax, was for use in Idaho. \* \* \*



## CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

CALVIN DWORSHAK,  
*Attorney for The  
American Oil  
Company.*

ARCHIBALD COX,  
*Solicitor General.*

LOUIS F. OBERDORFER,  
*Assistant Attorney General.*

STEPHEN J. POLLAK,  
*Assistant to the Solicitor General.*

I. HENRY KUTZ,  
ROBERT A. BERNSTEIN,  
*Attorneys for the United States.*

DECEMBER 1963.



## APPENDIX A

Opinion of the Supreme Court of the State of Idaho

THE AMERICAN OIL COMPANY, A MARYLAND CORPORATION,  
PLAINTIFF-RESPONDENT, AND CROSS-APPELLANT

v.

P. G. NEILL, FORMER TAX COLLECTOR OF THE STATE OF  
IDAHO, AND FLOYD WEST, ACTING TAX COLLECTOR OF  
THE STATE OF IDAHO, DEFENDANTS-APPELLANTS AND  
CROSS-RESPONDENTS

McFADDEN, J.

This action, originally brought by Utah Oil Refining Company, is to recover motor fuels tax payments made under protest to P. G. Neill, State Tax Collector. The payments were made during the period between January and November, 1960, for motor fuels delivered between November 4, 1959 and October 30, 1960. Subsequent to instituting the action The American Oil Company, as successor of Utah Oil Refining Company, was substituted as the plaintiff; P. G. Neill resigned as Tax Collector of the State of Idaho, and Vernon Drown was appointed as acting Tax Collector of the State; Mr. Drown died in office, and Floyd West, was later appointed as the Tax Collector of the State, and named herein as party defendant.

Defendant moved to dismiss the plaintiff's complaint; plaintiff moved for summary judgment, and defendant moved to dismiss the plaintiff's motion for summary judgment. The summary judgment was entered for the plaintiff in the principal amount

prayed for, but without interest. The judgment provided, *inter alia*:

That the Defendants, P. G. Neill, former Tax Collector of the State of Idaho, and Vernon E. Drown, Acting Tax Collector of the State of Idaho, and each of them, are hereby directed to refund and pay, or cause to be paid, to the Plaintiff, the American Oil Company, a corporation, the sum of \$86,181.30 hereby found to have been illegally and erroneously demanded and collected from the Utah Oil Refining Company, a corporation, predecessor in interest to the Plaintiff herein, as motor fuels taxes upon the transaction set forth in the complaint and supplemental complaints on file herein, *Provided however*, That this judgment shall not be satisfied out of the individual property of said Defendants or either of them.

Defendants appealed from the summary judgment and plaintiff cross appealed from that portion of the summary judgement refusing plaintiff any interest, from the portion thereof holding the defendants not personally liable, and denying plaintiff its costs;

The defendants' assignments are as follows:

1. The court erred in ruling and accordingly deciding that the federal commerce clause is involved, ruling that title to gasoline passed outside the State of Idaho and was imported into the State by its owner, on grounds and for the reasons that said ruling and holding is contrary to the evidence adduced and the law of the case.

2. The court erred in ruling and accordingly holding that title 49, chapter 7 of the Idaho Code and particularly I. C. § 49-1201 as amended 1959 cannot be construed to impose a motor fuels tax upon appellant herein on account of its attempted passage of title outside of the State of *Utah* [sic], when in truth and in fact the parties intended to, and they did

pass title within the State of Idaho, and there-  
in use and consume the gasoline.

3. The court erred in ruling and accordingly holding that the Federal Government is the ultimate consumer and therefore sovereign immunity to taxation applies on grounds and for the reasons that such holding is contrary to the facts adduced and the law in such [case] made and provided.

Defendant summarize their position on this appeal by recital of the following two issues:

1. In instances where the ultimate consumer is the Government of the United States of America, can the state impose a motor fuel tax?

2. Is the sovereign State of Idaho bound by the language of the contract or award between the respondent and the agent for the Atomic Energy Commission, or may this court view the transaction as a whole and determine by the actual conduct of the parties that title to the gasoline in question passed at Arco, Idaho rather than in Utah?

In order to understand the position of the respective parties concerning these assignments of error, a rather detailed statement of the facts leading to this litigation is essential.

The Federal Government, acting through the Atomic Energy Commission (referred to as the A.E.C.) operates facilities at Idaho Falls, and at the National Reactor Testing Station northwest from Idaho Falls.

The Phillips Petroleum Company is a contractor with the A.E.C. and on its behalf actually performs certain required services, including the operation of busses between Idaho Falls, and the National Reactor Testing Station. The gasoline, the basis of the controverted tax, was consumed in motor vehicles owned by the Federal Government, and used in transporting per-

sonnel connected with the A.E.C. A fee was charged for the transportation of persons using the Government busses, which fee accrued to the use and benefit of the Government. Losses involved in operating the busses were fully absorbed by the Government.

The Federal Government by the General Service Administration, a Federal agency, (sometimes referred to as G.S.A.) issued invitation for bids for supplying gasoline for activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959 through October 31, 1960. Included in this invitation (along with other items) were items Nos. 63 and 64 covering the needs for gasoline for the A.E.C., at Idaho Falls, and at the National Reactor Testing Station. Utah Oil Refining Company, submitted its formal bid on these items (with other bid items) to the General Service Administration office at Seattle, Washington.

On September 15, 1959, the G.S.A. accepted Utah Oil Refining Company's bid for listed items Nos. 63 and 64. In the bid as submitted, the bidder stated that the Idaho State tax of \$.06 per gallon was included in the bid. Both items Nos. 63 and 64 were submitted in alternative forms.

Item No. 63 was for 200,000 gallons of gasoline for Idaho Falls, with tank truck delivery quoted. The first alternative bid was as follows:

(a) f.o.b. bulk plant posted price date of bid \$1.905 Location of bulk plant Salt Lake City.

Under this alternate bid maximum price per gallon, after deductions was \$1.580 per gallon "Ex. State Tax." The other alternate was as follows:

(b) f.o.b. activity, transport truck delivered price date of bid: \$.2755.

Under this alternate bid, the maximum price per gallon, after deductions was \$.2418 per gallon.

5a

Item No. 64 was for 1,000,000 gallons of gasoline for the National Reactor site with identical alternates, except for prices quoted.

The A.E.C. through its operating agent periodically placed orders under the contract for delivery of the gasoline at the bulk plant at Salt Lake City. Common carriers selected and paid by the A.E.C. transported the gasoline from Utah to government owned storage tanks in Idaho. Monthly thereafter Utah Oil Refining Company, submitted the reports required by I.C. § 49-1210, and paid under protest to the State Tax Collector the \$.06 per gallon Motor Fuels Tax. Utah Oil Refining Company, a Delaware Corporation, authorized to do business in Idaho, was a licensed dealer as defined by the provisions of that chapter. The A.E.C. is not a licensed dealer. The status of Phillips Petroleum Company, as a licensed dealer, is immaterial to this decision, for its status is only that of a contractor of the A.E.C., at the Idaho Falls and National Reactor Testing station.

In 1933 the Legislature of Idaho enacted an excise tax on motor fuels, which act, later amended in subsequent legislative sessions is not contained in Chapter 12, Title 49, Idaho Code, with the "Special Fuel Use Tax Act" (S.L. 1953, Ch. 262). The 1933 act, as amended, fixes an excise tax on motor fuels. A "dealer" in motor fuels is defined as any person, (which includes individuals, firms, corporations, etc.), who first receives motor fuels in this state, as the term "received" is there defined.

All dealers are required to hold a permit by the State Tax Collector, issued upon application and posting of bond conditioned on compliance with the law. Such permit is required before any person can import, receive, use, sell or distribute motor fuels; non-com-



pliance with the law subjects any persons to criminal penalties and civil liabilities.

Each dealer is required to report monthly the gallonage of all motor fuels received for the preceding month, and to pay the \$.06 per gallon tax. Provisions are made for deductions from the gallonage reported for fuels exported, fuels sold or used in aircraft (which fuels bear a different tax), and fuels used in a non-highway activities, plus a 2% shrinkage allowance. The proceeds of the tax are paid by the Tax Collector to the State Treasurer for deposit in the dedicated highway funds of the state, including a special fund to be used for payment of lawful refunds of the tax. Excepting for the fuels contained in the fuel tank of a vehicle, the act requires payment of the tax by the vehicle owner on all fuels imported into the state by motor vehicles, in the event of failure of the "dealer", or "individual", for whom the importation is made, to pay the tax.

By amendments to the 1933 act the excise tax becomes due when the motor fuel is "received" by a licensed dealer. The 1959 amendment (S.L. 1959, Ch. 75), here involved, provides:

I.C. § 49-1201—Definitions. \* \* \*

(g) \* \* \* Motor Fuel, for the purpose of determining liability for the payment of the tax imposed by section 49-1210, shall be considered to be "received" in the following cases:

1. \* \* \*
2. Motor fuel imported into this state other than that placed in storage at refineries or pipeline terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who



owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; *further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho. \* \* \** [Emphasis added.]

Here the motor fuels on which the tax was paid were sold or supplied to an agency, not a holder of an uncanceled dealer permit, for importation into this state from Utah. These facts bring this action directly into the purview of the portion of the statute above underlined. The motor fuels sold, under the provisions of the act, must thus be considered to have been received by the Utah Oil Refining Company, for tax purposes, the moment the imported fuels were unloaded in the State of Idaho.

It must be pointed out that this section of the statute makes no distinction between the case where an Idaho dealer sells, inside the State, to an unlicensed person, from the case where he sells, supplies or furnishes the fuels to an unlicensed person for importation into the State. The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability

for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

It is contended by respondents, as pointed out by the trial court in its memorandum, that title to the gasoline passed from Utah Oil Refining Company to the A.E.C. at the bulk plant in Salt Lake City. The trial court and respondent are correct in this conclusion. When title passes is a question of intention of the parties. Uniform Sales Act, § 18; Utah Code Annotated § 62-2-2; Shipman v. Klopensburg, 72 Idaho 321, 240 P.2d 1151; Union Portland Cement Co., v. State Tax Commission (Utah), 170 P.2d 164, modified on rehearing on unrelated issue, 176 P.2d 879.

There is presented in this case the principal issue whether the statute in question impinges upon the Commerce Clause, (U.S. Const. Art. 1 § 8(3)), and upon the Due Process Clause of the Fourteenth Amendment. It is further contended that the imposition of this tax violates the due process clause of Idaho Constitution, Art. 1 § 13. In considering these constitutional questions it is essential to bear in mind that the burden of showing unconstitutionality of a statute is upon the party asserting it, and the invalidity must be clearly shown. Eberle v. Nielson, 78 Idaho 572, 306 P. 2d 1083; Curtis v. Pfost, 53 Idaho 1, 21 P. 2d 73; Boughton v. Price, 70 Idaho 243; 215 P. 2d 286; Rich v. Williams, 81 Idaho 311, 341 P. 2d 432; Caesar v. Williams, 84 Idaho 254, 371 P. 2d 241. A legislative act is presumed to be constitutional and

all reasonable doubt as to its constitutionality must be resolved in favor of its validity. *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 Pac. 32; *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P. 2d 384; *Rich v. Williams*, *supra*; *Caesar v. Williams*, *supra*.

Plaintiff asserts that this tax cannot be sustained against the constitutional challenge on the theory that it is a "sales" tax, for the reason that the "sale" took place outside the state and a tax on it would violate the due process clause of the Federal Constitution, relying upon *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304. Plaintiff also claims this tax cannot be sustained upon the theory that it is a "use" tax, for the "use" is by an agency of the Federal Government, immune from imposition of taxes by the State.

The legal issues raised by those contentions have been serious and difficult ones for the Supreme Court of the United States and have been the subject of numerous articles by legal writers. See: October 1960 issue of *Virginia Law Review*, (46 Va. Law Rev. pgs. 1051 et seq.). The Supreme Court has discussed the basic problem of the commerce clause in these words:

The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166, 74 S. Ct. 396, 98 L. Ed. 583.

Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and

the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. *N. W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 457; 79 S. Ct. 357, 3 L. Ed. 2d 421.

Paul J. Hartman, Professor of Law, Vanderbilt University, in his article, "State Taxation of Interstate Commerce," 46 Va. Law Review, 1051, at page 1059, in discussing the effect of the due process clause states:

\* \* \* The restraining power of the due process clause, it might be said, keeps the taxing power at home. It prevents a state from fixing its tax talons on extra-territorial values. The absence of any sufficient "nexus" or connection in fact between the taxed business and the taxing state would be enough in itself for upsetting a tax on due process grounds. The term "nexus" has become an indispensable part of the tax vocabulary, when reference is to the requisites of the due process clause as applied to state and local taxation of multistate operations. Consistent with these nexus requirements a state can exert its taxing power only in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred. \* \* \* (*Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267.)

In *McLeod v. J. E. Dilworth Co.*, supra, the Supreme Court struck down as unconstitutional the Arkansas sales tax when applied to an order solicited by a drummer for a Tennessee company. It was held that Arkansas could not collect a sales tax when the order was solicited by a drummer in that state for acceptance in Tennessee by the seller, who then shipped the goods directly to the Arkansas buyer, title passing in Tennessee. The court agreed that a sales tax might have the same result as a use tax, but rejected the argument that the sales tax could be sustained because the seller would have been required to pay a use tax to Arkansas. In discussing the distinction between a "sales" tax and an "use" tax, the court stated:

A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation, of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.



The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583, 81 L. Ed. 814, 819, 57 S. Ct. 524. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution; neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision, by inaccurately defining it." *Wagner v. Covington*, 251 U.S. 95, 102, 64 L. Ed. 157, 167, 40 S. Ct. 93. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

The distinction between these two types of tax as discussed by the majority opinion in *McLeod v. J. E. Dilworth Co.*, *supra*, was rejected by Mr. Justice Douglas in his dissenting opinion in that case, where he stated:

It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence.

It is noteworthy that the same day the opinion in *McLeod v. J. E. Dilworth Co.*, (*supra*) was an-



nounced, the Supreme Court of the United States rendered its opinion in *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309. The majority opinion in both of these cases was written by Mr. Justice Frankfurter. The end result of these two cases was that insofar as the imposition of a use tax was concerned when imposed in a business involved in interstate commerce, such was not unconstitutional as being discriminatory against interstate commerce, or contrary to the due process provision, but that a sales tax would be.

In *General Trading Co. v. State Tax Comm'n.* (supra) the Iowa Tax Commission brought suit in an Iowa court against General Trading Co., for taxes assessed under the Iowa use tax law with respect to tangible personal property sold and delivered to Iowa "users" of the property. General Trading was a Minnesota corporation, and had not qualified to do business, and did not maintain any office, branch or warehouse, in Iowa. The property in respect of which the use tax was levied was sent to Iowa in response to orders solicited and obtained by salesmen traveling into Iowa from their Minnesota headquarters. The orders were subject to acceptance in Minnesota, after which the goods were sent to Iowa by common carrier. As stated above, the Supreme Court held such tax did not violate the federal constitution, although it again reiterated that "—no State can tax the privilege of doing interstate business \* \* \*. That is within the protection of the Commerce Clause and subject to the power of Congress."

Mr. Justice Rutledge specially concurred in *General Trading Co. v. State Tax Comm'n.*, supra, and in *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (opinion

being rendered the same day) and dissented in *McLeod v. J. E. Dilworth*, *supra*. In his special opinion discussing these cases, he points out with clarity the danger of categorizing of any one type of tax as "sales" or "use", as follows:

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes placed upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. e.g., *Western U. Tele. Co. v. Kansas*, 216 U.S. 1, 54 L. Ed. 355, 30 S. Ct. 190. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue". But, though overlapping, the

two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state, the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the General Trading Co. Case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state." The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in

this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

In discussing the effect of the commerce clause of the Federal Constitution, Justice Rutledge points out:

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various collary formulations. One is that a state may not single out interstate commerce for special tax burden. (citing cases). Nor may it discriminate against interstate commerce and in favor of its local trade. (citing cases). Again, the state may not impose cumulative burdens upon interstate trade or commerce. (citing cases). Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.

The Supreme Court of the United States subsequently was presented with a similar problem in *Miller Bros v. Maryland*, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744. That case involved taxation of Miller Bros., a Delaware corporation, under a Maryland "use" tax.

The corporation operated a store in Delaware; some of its Maryland customers came to Delaware, made their purchases and took the purchases home. In some cases the purchases were delivered to the Maryland customers by common carrier. Miller Bros. advertised in Delaware newspapers and radio stations, and also mailed sales circulars to its customers, including the Maryland residents. Upon failure of the corporation to collect and remit the Maryland use tax on its sales to Maryland customers and, seeking to enforce this obligation, the state of Maryland attached one of the Miller Bros. delivery trucks. The Supreme Court held the tax invalid. In reconciling this result with the *General Trading Company* case the Court through Mr. Justice Jackson, stated:

\* \* \* But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market. That these inhabitants incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign mer-



chant in the absence of some jurisdictional basis not present here.

Justice Douglas' dissenting opinion in *McLeod v. J. E. Dilworth Co.*, supra, and Justice Rutledge's special opinion wherein he concurred in *General Trading Co. v. State Tax Comm'n.*, and *International Harvester Co. v. Department of Treasury*, and also dissented in *McLeod v. J. E. Dilworth*, are quoted from at length herein, because in our opinion the basic judicial philosophy disclosed therein became the rationale of the Supreme Court's later opinion in *Scripto, Inc., v. Carson*, hereinafter discussed.

Again a similar problem was presented the Supreme Court in *Scripto, Inc., v. Carson*, 362 U.S. 207, 80 S. Ct. 619, 5 L. Ed. 660. In that case, a Georgia corporation, having no office, distributing warehouse, or other place of business in Florida, and having no bank account, stock of goods, regular employees or agents in or salesman traveling into Florida, shipped merchandise, f.o.b. Atlanta, to Florida customers, pursuant to orders solicited by Florida wholesalers or jobbers. The wholesalers or jobbers were independent contractors working on a commission basis, with no authority to make collections on behalf of *Scripto, Inc.*

The majority opinion, in reconciling the holding with *Miller Bros. v. Maryland*, supra, stated:

Appellant earnestly contends that *Miller Bros. Co. v. Maryland*, supra, is to the contrary. We think not, Miller had no solicitors in Maryland; there was no "exploitation of the consumer market"; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an "occa-



sional" delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. This led the court to conclude that Miller would be made "more vulnerable to liability for another's tax than to a tax on itself." 347 U.S. at 346. In view of these considerations, we conclude that the "minimum connections" not present in Miller are more than sufficient here.

Here we are dealing with an excise tax, the purpose of which is to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state. *Union Pac. R.R. Co. v. Riggs*, 66 Idaho 677, 166 P. 2d 926. *State v. Boise City*, 57 Idaho 507, 66 P. 2d 1016. The process by which the funds are raised is by placing the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the "dealers" as that term is defined by the statute. The relationship between the State of Idaho, Utah Oil Refining Company, and this tax is more than a casual connection. The gasoline, the subject of the tax, was for use in Idaho. Utah Oil Refining Company, a Delaware corporation, subjected itself to the jurisdiction and control of the state of Idaho, when it became authorized to do business herein, and additionally so when it applied for and was granted a "dealer's" permit authorizing it to enter into the Idaho market as a distributor of motor fuels,—authorizing it to

engage in the very activity it now claims is exempt from the tax.

These connections between Utah Oil Refining Company, and the state of Idaho, or the "nexus" are more than incidental. The contract itself, between that oil company and General Service Administration, by the bid items Nos. 63 and 64, was phrased in the alternate for delivery of the gasoline either at the facility or at the bulk plant.

The line of demarcation between the cases where sufficient nexus is found to uphold a particular tax, and the cases of such insufficiency of nexus as to invalidate a tax on constitutional grounds, is a tenuous and intangible one. Here, this connection is more substantial and evident than that found in the case of *Scripto, Inc., v. Carson*, supra; it cannot be said this tax violates the due process clause of either the United States or the Idaho constitutions.

In *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267; the Supreme Court of the United States, speaking through Justice Frankfurter, stated:

The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

\* \* \* That test is whether property was taken without due process of law, or, if paraphrase

we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. \* \* \*

In the case at bar it is difficult to discern a clear violation of the commerce clause of the Federal Constitution. The inhibition against imposition of a tax upon interstate commerce is not as to the tax itself, but only when the tax becomes an undue burden upon interstate commerce, or when it discriminates against the out of state, as compared to the intrastate vendor. *Halliburton Oil Company, Well Cementing Co., v. Reily*, (U.S. Sup. Ct. May 13, 1963) 83 S. Ct. 1861. It cannot be said that there is any discrimination between *Utah Oil Refining Company* as compared to a local "dealer"; both are subject to an identical tax burden as it relates to the importation, receiving or sale of gasoline. No undue burden on interstate commerce is disclosed by this tax; therefore it is not in violation of the commerce clause of the Federal Constitution. *Scripto Inc., v. Carson* (supra), *General Trading Co. v. State Tax Commission* (supra).

This appeal presents one remaining issue. Plaintiff asserts that the incidence or burden of this tax falls on an agency of the Federal Government, and hence it cannot be levied against *Utah Oil Re-*

fining Company, as vendor of the gasoline to the Atomic Energy Commission. *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615, held that the constitutional immunity of the United States from state taxation was not infringed by the exaction of a state sales tax, with which the seller is chargeable but which he is required to collect from the buyer, in respect of materials purchased by a contractor with the United States on a cost, plus basis. This was held to be true notwithstanding that under the contract the title to such materials was in the United States on shipment by the seller. In a series of three cases, the Supreme Court of the United States ruled that a Michigan state statute, authorizing taxation of property of the Federal Government held by a private party and used in fulfilling governmental contracts, was not unconstitutional. *United States v. City of Detroit*, 355 U.S. 466, 78 Sup. Ct. 474, 2 L. Ed. 2d 424; *United States v. Muskegon*, 355 U.S. 484, 78 Sup. Ct. 483, 2 L. Ed. 2d 436; *Detroit v. Murray Corp.*, 355 U.S. 489, 78 S. Ct. 458, 2 L. Ed. 2d 441. In *United States v. City of Detroit*, supra, it was stated:

This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 6 S. Ct. 670, 29 L. Ed. 845. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. See e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82

L. Ed. 155; *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927; *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3. \* \* \*

We therefore conclude that the tax immunity of the Atomic Energy Commission, if such there be, does not extend to the contractor furnishing the supplies. See: *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 73 S. Ct. 800, 97 L. Ed. 1174; *Alabama v. King & Boozer*, supra; *United States v. Detroit*, supra; *United States v. Muskegon*, supra; *Detroit v. Murray Corp.*, supra.

The summary judgment of the trial court is reversed and the trial court is instructed to dismiss the action.

Costs to appellant.

KNUDSON, C.J., MCQUADE, TAYLOR, JJ., AND DUNLAP, D.J., concur.

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Memorandum Decision of the District Court of the Third Judicial District of the State of Idaho

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THE AMERICAN OIL COMPANY, A MARYLAND  
CORPORATION, PLAINTIFF

vs.

P. G. NEILL, AS TAX COLLECTOR OF THE STATE OF  
IDAHO, DEFENDANT

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The above entitled action is now pending before this Court upon a number of motions. These are:

1. Defendant's motion to dismiss on the ground that plaintiff's complaint does not state a claim upon which relief can be granted.



2. Plaintiff's motion for summary judgment on the ground that there are no genuine issues of material fact in dispute and that plaintiff is entitled to a judgment as a matter of law.

3. Defendant's motion to dismiss plaintiff's motion for summary judgment on the basic ground that these are matters solely within the knowledge of plaintiff and others which are material to the issues, which defendant cannot at this time produce in opposition to plaintiff's motion for summary judgment; or, in the alternative, that defendant be granted additional time to submit additional depositions and affidavits in opposition to plaintiff's motion for summary judgment.

Whether defendant's last named motion should be granted or not depends upon a determination of whether the proposed or prospective evidence would have a material bearing upon a decision of the ultimate issue in controversy. This requires a rather extensive review of the pleadings and factual matters now in the record.

The ultimate issue to be decided in this case is the validity and constitutionality of defendant's application of Chapter 12, Title 49 of the Idaho Code, dealing with motor fuel taxes, to the facts of the particular transaction involved in this action. Defendant has collected the excise tax provided for by Section 49-1210 I.C. from plaintiff, under the theory that the gasoline in question was "received" by plaintiff under the provisions of Section 49-1201(g)2, I.C., which provides in its essential parts:

Motor fuel imported into this state other than that placed in storage \* \* \* shall be considered received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned



such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer's permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; *further provided that motor fuel that is in any MANNER supplied, sold, or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer's permit, by an Idaho licensed dealer, for importation into the state of Idaho, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such fuel immediately after the imported motor fuel has been unloaded in the state of Idaho. \* \* \**

4. Motor fuel acquired in this state by any person, other than as set forth in paragraphs (1), (2) and (3) of this subsection, shall, unless the person from whom the same is acquired has with respect thereto paid or incurred liability for, or the burden of, the tax imposed by this chapter or unless the same shall be exempt \* \* \* be considered to be first received by the person so acquiring the same at the time so acquired. [*Italic mine.*]

In general terms, the facts now established without controversy are, that in June, 1959 the General Services Administration of the U.S. Government issued an invitation for bids for furnishing gasoline to certain governmental agencies in the states of Montana, Idaho, Oregon and Washington for the period of November 1, 1959 through October 31, 1960; that in said invitation were items covering the purchase of gasoline for the Atomic Energy Commission and National Reactor, at Idaho Falls, Idaho; that on October 28, 1959 plaintiff's bid was accepted and GSA formally awarded the contract to plaintiff at Seattle,

Washington, under bid items 63A and 64A. The gasoline was sold at a designated price, f.o.b. Bulk Plant, Salt Lake City, Utah. Pursuant to the terms of the contract the A.E.C. was the ordering activity, and upon order of the A.E.C. or its operating company, Phillips Petroleum, plaintiff delivered some 1,436,355 gallons of gasoline to common carriers selected by the A.E.C. or its operating company, Phillips Petroleum Co., who transported it to Idaho Falls, where it was placed in A.E.C. owned storage tanks and used in A.E.C. operations in Idaho. Part of such use was the operation of government owned buses for transportation of workers to the NRT site over Idaho state highways; that by a contract between the A.E.C. and Phillips Petroleum Co., most of the actual operation is done by Phillips.

Because plaintiff was at all times a holder of an Idaho dealer's permit pursuant to Title 49, Chapter 12, Idaho Code, and the A.E.C. was not, defendant insisted that plaintiff pay the tax imposed by Section 49-1210 I.C., under the theory that plaintiff was a "receiver" of this gasoline pursuant to the provisions of 49-1201(g)2, providing that motor fuel

supplied, sold or furnished to any \* \* \* agency, not the holder of an uncanceled Idaho Dealer's Permit, by an Idaho licensed dealer, for importation into the state from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, immediately after the imported motor fuel has been unloaded. \* \* \*

It seems clear that the transaction above outlined falls within the terms of the statute, and if the statute or its application here is valid, then the tax is proper. Plaintiff contends that the provision is unconstitutional and invalid, as here applied, in that the 14th Amendment, the Commerce Clause and the Supremacy

Clause of the U.S. Constitution are violated; as is the Due Process Clause of the Idaho Constitution. Plaintiff has paid the taxes in question with appropriate protests, and now seeks reimbursement together with interest.

Defendant contends that there may be additional facts which he will be able to present on trial or with further discovery, which are necessary to a decision of this case. As revealed by defendant's affidavits, these facts will be that the gasoline here involved was consumed in the state of Idaho by Phillips Petroleum Co. in the furtherance of its management contract with the A.E.C., by which Phillips operates certain motor vehicles over Idaho highways to transport employees of various private corporations to the NRT near Arco, Idaho; that Phillips Petroleum charges a fee for transportation of such employees; that the gasoline is delivered to the custody of Phillips at Idaho Falls and is there introduced into the various vehicles by Phillips. It should be noted that defendant does not controvert or contend that he can controvert the affidavits of W. A. Erickson that the vehicles in question are solely owned or leased by the A.E.C. and that the fees received by passengers are the property of the U.S. Government or A.E.C.

In the final analysis, defendant contends that on trial or after additional discovery he can show in substance that the overall transaction is the sale of gasoline by plaintiff to Phillips Petroleum Co. for use in operating motor vehicles over the highways of the state of Idaho. (Page 3 defendant's brief on motion to dismiss summary judgment.)

Defendant contends also that he may be able to show that there was a collusive agreement between the A.E.C., Phillips Petroleum and plaintiff, by which

they established the procedures in question to avoid payment of the Idaho Fuel Tax.

It appears to me that the proposed evidence of defendant can only become material in this case if the tax in question be considered a "use tax" in the usual sense. This appears to be defendant's position also, because he relies for the most part on "Sales and Use Tax" cases, i.e.; *General Trading Co. vs. State Tax Commission*, 332 U.S. 335, 88 L. Ed. 1309; *Miller Bros. Co. vs. Maryland*, 347 U.S. 340; 89 L. Ed. 744; *Scripto, Inc. vs. Carson*, 4 L. Ed. 2d 660; *McGoldrich vs. Borwind White Coal Mining Co.*, 309 U.S. 33; *McGoldrich vs. Felt & Tarrant Manufacturing Co.*, 309 U.S. 70. In each of these cases a "sales" or "use" tax was involved which placed the incidence of the tax and the economic impact of the tax on the ultimate buyer or consumer, in clear and certain terms, and the states were allowed to require an out-of-state vendor to "collect" it for them. The usual use tax is a defensive tax by a state to support a retail sales tax, and taxes the use, consumption or storage of a particular commodity. A good example of what I consider a true use tax to be, is our Idaho Special [Fuels] Use Tax (Section 49-1231 I.C.), which levies an "excise tax of 6 cents per gallon on the use of special fuel in any motor vehicle while operated upon the highway \* \* \*." The tax is collected by the special fuel dealer, and clearly falls on the user or consumer in its ultimate impact.

The "gasoline" fuel tax statute with which we are here involved, however, is ambiguous, as regards its true nature. By Section 49-1210 I.C. it places the tax directly upon the dealer and requires him to:

pay an excise tax of 6 cents per gallon on all motor fuels "received" as defined by Section 49-1201 \* \* \* less the deductions and credits authorized, \* \* \*

which are (A) exported fuel (49-1215), (B) aviation fuel, (C) exempt use (non-highway) and (D) 2% shrinkage and expense reimbursement, one-half of which must be passed on to the actual dealer.

While the term "received" has varying meanings as used in 49-1201, the end effect is to place the burden of the tax directly on the licensed dealer except as provided in subsection (g)<sup>4</sup> when there is no licensed dealer. The tax is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the state, except in a factual situation such as is here involved.

However, there is an indication that the legislature felt that the ultimate impact of the tax would be on the consumer of the fuel when it allowed a claim of refund by the purchaser-consumer for non-highway use (49-1218 I.C.), and made no provision for the licensed dealer to claim such refunds unless he personally used gasoline for non-highway purposes (49-1210(e)). This is the only indication in the Act that the excise tax is a special sales or use tax on the consumer in the usual sense. However, the dealer is not in any way required to pass the tax on or collect it from the consumer, and the ultimate purchaser or consumer has no responsibility whatsoever for payment of the tax. While it may be the overall policy of the state to collect a tax of 6c per gallon on all gasoline used to propel motor vehicles over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the "receipt" of the gas by the dealer. It cannot be said under this statute that the licensed dealer is the mere collector of a tax from the purchaser or user, as was the holding in each of the cases relied upon by the defendant (supra). The



Idaho administrative interpretation of the statute in the past has been to treat it as a privilege tax upon the dealer and not as a sales or use tax on the consumer. I conclude this is the correct interpretation.

It follows, then, that the evidence which defendant feels he may be able to produce, would not be material to a decision of this case, because if it is not a "use tax," it becomes unimportant who was the actual purchaser. Therefore, defendant's motion to dismiss the summary judgment or to give him additional time to produce proof of this nature for purposes of the summary judgment motion should be denied.

If the tax in question cannot be justified as a "use tax," it is under the facts of this case a tax on a privilege which is exercised and performed wholly outside of the state of Idaho, and is a violation of the Commerce Clause and Due Process of Law. It is clear that the contract in question was wholly made, executed and performed outside the state of Idaho. The only incidents which connect the state of Idaho with the transaction at all are (1) the circumstance that plaintiff happens to be a licensed dealer in Idaho—if it were not, Idaho would have no hold on it whatsoever; and (2) the gasoline, the legal title to which passed to either the U.S. Government or Phillips Petroleum Co. outside the state of Idaho, was imported into the state by its owner.

The U.S. Supreme Court decision which involves a situation closest to the facts of this case, in my opinion, is *Norton Co. vs. Dept. of Revenue of the State of Illinois*, (1951) 340 U.S. 534, 95 L. Ed. 517. In this case the Norton Co., whose home was in Massachusetts, was authorized to do business in Illinois and maintained a warehouse and branch office in Illinois. Part of its sales were made locally and a part were



by direct order to the Massachusetts office and shipped directly to Illinois purchasers in interstate commerce. The Illinois tax was on "persons engaged in the business of selling tangible personal property at retail in" Illinois, and the U.S. Supreme Court said:

Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod vs. J. E. Dilworth Co.*, 322 U.S. 327, 88 L. Ed. 304, 64 S. Ct. 1023, 1030. *Of course a state imposing a sales or use tax can more easily meet this burden because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor.*

But when, as here, the corporation has gone into the state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. [*Italic mine.*]

It is my opinion that plaintiff in the case at bar has clearly shown that the transaction in question is "dissociated from [its] local business and [is] interstate in nature." It appears to me that Idaho in this instance is attempting to levy the tax on the privilege of doing interstate business, in violation of the U.S. Constitution. *General Trading Co. vs. State Tax Commission*, 322 U.S. 335; *McLeod vs. J. E. Dilworth Co.*, 322 U.S. 327.

In addition, under the facts of this case I am of the opinion that there is a denial of due process to plaintiff as the result of the levy of the tax, because the tax is really levied on a privilege exercised in Utah and derived from the laws of that state. There is insufficient "nexus" between plaintiff and the

State of Idaho. See *Miller Bros. vs. Maryland*, 347 U.S. 340, 98 L. Ed. 744, wherein the Supreme Court said:

If there is some jurisdictional fact or event to serve as a conductor, the reach of a state's taxing power may be carried beyond its borders. When it has the taxpayer within its power or jurisdiction, it may sometimes, through him reach his extraterritorial income or transactions, and it may sometimes, through these reach the non resident. \* \* \*

Due process requires some definite link, some minimum connection between a state and a person, property or transaction it seeks to tax.

See also *Connecticut General Life Ins. Co. vs. Johnson*, 303 U.S. 77; and *James vs. Dravo Contracting Co.*, 302 U.S. 134, and similar cases cited by plaintiff in its brief.

Thus in summary I conclude that the tax in question is basically a tax on the privilege of licensed petroleum dealers to own gasoline in Idaho for sale or use in Idaho, and that it is not a use tax, the impact of which is on the local consumer. As such, the tax as here applied to a sale made in Utah is a tax on interstate commerce and a violation of due process of law, in that it taxes a privilege of plaintiff exercised outside of Idaho's jurisdiction.

Lastly, I would point out that if defendant's theories as to the ownership of the gasoline at the time of its importation into the state of Idaho are correct, that is, that Phillips Petroleum Co. was the true owner, this gasoline need not escape taxation, because Phillips would be clearly liable for it, but this plaintiff would not. Phillips could be said to have received it under 49-1201(g)2 I.C., if it is a

licensed dealer, or if it is not a licensed dealer, it could be held under 49-1201(g)4 I.C. If the U.S. Government was the true purchaser and owner, plaintiff would not be liable for the tax, even if I am in error and it is a use tax on the consumer, because of federal government immunity. If it is a privilege tax on plaintiff, as I here hold, its application in this case is still unconstitutional, regardless of the ownership of the gasoline at the time of its importation, unless plaintiff owns it.

Thus I conclude that plaintiff is entitled to a summary judgment for a refund of the tax paid herein, but as defendant has pointed out, the issue of right to interest has not been presented to me. I feel the parties should be granted an opportunity to present their views thereon. I will therefore hold up entry of summary judgment until counsel has presented their views on this issue. Please consult and advise me how you wish to do this.

Dated this 20th day of June, 1961.

MERLIN S. YOUNG,  
*District Judge.*

**Judgment of the Supreme Court of the State of Idaho****No. 9113****THE AMERICAN OIL COMPANY, A MARYLAND CORPORATION,  
PLAINTIFF-RESPONDENT, AND CROSS-APPELLANT****v.****P. G. NEILL, FORMER TAX COLLECTOR OF THE STATE  
OF IDAHO, AND FLOYD WEST, ACTING TAX COLLECTOR  
OF THE STATE OF IDAHO, DEFENDANTS-APPELLANTS,  
AND CROSS-RESPONDENTS**

Justice McFadden announced the decision in this cause June 20, 1963, that the judgment of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, is reversed and the trial court is instructed to dismiss the action.

Subsequent to the announcement of this decision the Court regularly granted Respondent and Cross-Appellant's application to stay execution of the judgment on remittitur until after October 7, 1963, in order to enable Respondent and Cross-Appellant to apply to the Supreme Court of the United States of America for a Writ of Certiorari or to perfect an appeal of this cause to said Court.

The trial court is therefore directed to withhold dismissal of this action until October 7, 1963. Costs to appellants.

**IT IS NOW THEREFORE SO ORDERED.**

I, L. J. Bideganata, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the judgment entered in the above entitled cause July 11, 1963, and now of record in my office.

WITNESS My hand and the seal of this Court, July 11, 1963.

*/s/ L. J. BIDEGANETA,  
Clerk of the Supreme Court,  
State of Idaho.*

## APPENDIX B

The pertinent portions of the Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49-1201 *et seq.* (1963 Cum. Pocket Supp.) are as follows:

49-1201. *Definitions.*—The following words, terms and phrases in this chapter, are, for the purpose thereof, defined as follows:

(c) The word "person" includes any individual, firm, co-partnership, association, corporation (both private and municipal), or other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

(d) The term "dealer" shall include any person, as hereinabove defined, who first receives motor fuels in this state within the meaning of the word "received" as hereinafter in this section defined.

(g) Motor fuel, for the purpose of determining liability for the payment of the tax imposed by section 49-1210, shall be considered to be "received" in the following cases:

1. Motor fuel refined at a refinery in this state and placed in tanks thereat or motor fuel transferred from points outside this state or from a refinery or pipe line terminal in this state and placed in tanks thereat shall be considered to be received when such fuel is withdrawn from such refinery or terminal storage for sale or use in this state or for transportation to destinations in this state other than for transfer to other refineries or pipe line terminals.



in this state, and not before. When withdrawn from such refinery or terminal storage such motor fuel shall be considered to be received by the person for whose account such motor fuels were withdrawn if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owns such fuel immediately prior to its withdrawal from said storage.

2. Motor fuel imported into this state other than that placed in storage at refineries or pipeline terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho. \* \* \*



**49-1202. [1957 ed.] Application for permit—Contents—Issuance of permit to dealers—Fee.—**  
 It shall be unlawful for any dealer to import, receive, use, sell or distribute any motor fuels or to engage in business, as a dealer in motor fuel, within this state unless such dealer is the holder of an uncanceled permit issued by the commissioner to engage in such business. \* \* \*

**49-1210. Report of motor fuel received—Excise tax.—**(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49-1201, during the preceding calendar month, and pay an excise tax of six cents per gallon on all motor fuels as provided in subsection (b) of this section. \* \* \*

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49-1201, by such dealer during the next preceding calendar month, less the deductions and credits authorized in this chapter. \* \* \*

**49-1218. Refunding of tax.—**Any person who shall buy fifty gallons or more and use any motor fuel for the purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle re-

quired to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was purchased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him \* \* \*

\* \* \* \* \*

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No. ~~18~~ 19

**In the Supreme Court of the  
United States**

OCTOBER TERM, 1964

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF IDAHO

**MOTION TO DISMISS**

**ALLAN G. SHEPARD,**  
*Attorney General of the  
State of Idaho.*

**WM. M. SMITH,**  
*Assistant Attorney General of  
The State of Idaho.*

**FAIRER F. TWAY,**  
*Chief Legal Counsel of the  
Idaho Department of Highways.*

## INDEX

Statement of Facts .....	1
Questions presented .....	3
Constitutional and statutory provisions involved .....	4
Argument .....	4
I. This appeal is not taken in conformity to statute or to the Court rules .....	4
II. No substantial federal question is presented, and .....	5
III. The judgment of the lower courts rests on an adequate non-federal basis .....	5
A. Since the tax is a toll, all must pay it .....	5
B. The Due Process Clause of the Fourteenth Amendment is not applicable .....	8
C. The Interstate Commerce Clause is not applicable .....	12
D. The issue of governmental immunity is correctly decided by the lower court .....	16
E. The action by appellant amounts to dis- crimination .....	19
Summary .....	21
Conclusion .....	22
Appendix .....	1a

## CITATIONS

### Cases:

<i>Adams Mfg. Co. v. Storen</i> , 304 U.S. 307 .....	13, 15
<i>Aero Mayflower Transit Co. v. Comm'rs</i> , 332 U.S. 495 .....	7, 13, 14, 15
<i>Alabama v. King &amp; Boozer</i> , 314 U.S. 1 .....	16, 17
<i>Alward v. Johnson</i> , 282 U.S. 509 .....	16
<i>American Oil Co. v. Neill</i> , 86 Idaho , 383 P.2d 350 .....	5, 9, 10, 12

## II

<i>Barwise v. Shepard</i> , 299 U.S. 33 .....	9
<i>Bingman v. Golden Eagle Western Lines, Inc.</i> , 297 U.S. 626 .....	13
<i>Capitol Greyhound Lines v. Brice</i> , 339 U.S. 542 .....	10, 14, 15
<i>City of Detroit v. Murray Corp.</i> , 355 U.S. 489 .....	14, 16, 17, 18
<i>Clark v. Paul Gray Inc.</i> , 306 U.S. 583 .....	15
<i>Clark v. Poor</i> , 274 U.S. 554 .....	13, 14, 15
<i>Connecticut General Life Ins. Co. v. Johnson</i> , 303 U.S. 77 .....	8
<i>Curry v. United States</i> , 314 U.S. 14 .....	9, 16, 17
<i>Esso Standard Oil Co. v. Evans</i> , 345 U.S. 495 .....	16, 17, 18
<i>General Trading Co. v. State Tax Commission</i> , 322 U.S. 335 .....	11, 12
<i>Gregg Dying Co. v. Query</i> , 286 U.S. 472 .....	15
<i>Halliburton Oil Well Cementing Co. v. Reilly</i> , 373 U.S. 64 .....	10
<i>Helvering v. Clifford</i> , 309 U.S. 331 .....	9
<i>Hennesford v. Silas Mason Co.</i> , 300 U.S. 577 .....	9, 10
<i>Independent School District v. Pfost</i> , 51 Idaho 240, 4 P.2d 893 .....	10
<i>James v. Dravo Construction Co.</i> , 302 U.S. 134 .....	16, 17
<i>Jorgensen v. George</i> , 56 Idaho 81, 50 P.2d 1 .....	11
<i>Kane v. New Jersey</i> , 242 U.S. 160 .....	13, 15
<i>Kern-Limerick, Inc. v. Scurlock</i> , 347 U.S. 110 .....	18
<i>McCulloch v. Maryland</i> , 4 Wheat. 316 .....	7
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> , 309 U.S. 33 .....	15
<i>McLeod v. Dilworth Co.</i> , 322 U.S. 327 .....	9
<i>Mayor and Council of New Castle v. United States</i> , 162 F.Supp. 59 and 243 .....	19

### III

<i>Miller Bros. v. Maryland</i> , 347 U.S. 340	12
<i>Monomotor Oil Co. v. Johnson</i> ,	
292 U.S. 86	10, 13, 14, 15
<i>Norton Co. v. Dept. of Revenue</i> , 340 U.S. 534	13, 15
<i>Offutt Housing Co. v. County of Sarpy</i> ,	
351 U.S. 253	18
<i>Oregon Short Line R.R. Co. v. Pfost</i> ,	
53 Idaho 559, 27 P.2d 877	10
<i>Panhandle Oil Co. v. Mississippi</i> , 277 U.S. 218	17
<i>Reconstruction Finance Corporation v. Beaver</i>	
<i>County</i> , 328 U.S. 204	19
<i>Robbins v. Shelby County Taxing District</i> ,	
120 U.S. 489	13, 15
<i>Scripto, Inc. v. Carson</i> , 362 U.S. 207	9, 11, 12
<i>Silas Mason Co. v. Tax Commission</i> , 302 U.S. 186	16
<i>Smiley v. Holm</i> , 285 U.S. 355	11
<i>South Carolina State Highway Department v.</i>	
<i>Barnwell Bros.</i> , 303 U.S. 177	13
<i>Spector Motor Service v. O'Connor</i> ,	
340 U.S. 602	13, 15
<i>S.R.A., Inc. v. Minnesota</i> , 327 U.S. 558	18
<i>Stockyards Nat. Bank of Chicago v. Arthur</i> ,	
45 Idaho 333, 262 Pac. 510	11
<i>Tirrell v. Johnson</i> , 86 N.H. 530, 171 Atl. 642,	
aff'd 293 U.S. 533	6, 8, 10
<i>Trinityfarm Construction Co. v. Gros Jean</i> ,	
291 U.S. 466	16
<i>Union Pacific R.R. Co. v. Riggs</i> ,	
66 Idaho 677, 166 P.2d 926	10
<i>Union Refrigeration Transit Co. v. Kentucky</i> ,	
199 U.S. 194	8
<i>United States v. Alaska S.S. Co.</i> , 253 U.S. 113	11



#### IV

*United States v. City of Detroit*, 355 U.S. 466 ..... 14, 16, 18

*United States v. County of Allegheny*,

322 U.S. 174 ..... 18

*United States v. Livingston*,

179 F.Supp. 9, aff'd 364 U.S. 281 ..... 17, 18

*United States v. Township of Muskegon*,

355 U.S. 484 ..... 9, 14, 16, 17, 18

*Wilson v. Cook*, 327 U.S. 479 ..... 4, 10

#### Constitutions:

Constitution of the United States:

Article I, Section 8 (Commerce Clause) ..... 3, 13, 14

Fourteenth Amendment (Due Process Clause) ..... 3, 10

Constitution of the State of Idaho:

Article VII, Section 17 ..... 4, 6, 1a

#### Statutes:

Federal Statutes:

Atomic Energy Act,

68 Stat. 952, 42 U.S.C. 2208 ..... 19, 4a

Defense Housing Act,

54 Stat. 1127, as amended, 42 U.S.C. 1546 ..... 19

Judicial and Judiciary Procedure Act,

28 U.S.C. 1257(2) ..... 4

State Statutes:

7A Idaho Code 40-2210 ..... 4, 6, 1a

9 Idaho Code 49-1201(1)(2) ..... 1, 12

9 Idaho Code 49-1210(d) ..... 4, 6, 2a

9 Idaho Code 49-1212 ..... 4, 6, 2a

9 Idaho Code 49-1241 ..... 4, 6, 3a

## Miscellaneous:

Hearing before Joint Committee on Atomic	
Energy,, 82 Cong., 2nd Sess. ....	20
Senate Report No. 694, 83rd Cong., 1st Sess. ....	20
Senate Report No. 1310, on S. 2938,	
76th Cong., 3rd Sess. ....	19

**In the Supreme Court of the  
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**OCTOBER TERM, 1963**

---

**THE AMERICAN OIL COMPANY, APPELLANT**

**v.**

**P. G. NEILL, ET AL**

---

**ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF IDAHO**

---

**MOTION TO DISMISS**

COME NOW appellees above named and move the Honorable Supreme Court of the United States for order of dismissal on the grounds and for the reasons: (a) This matter is not taken in conformity to statute or to the rules of this Court; (b) No substantial federal question is presented by this matter; and (c) The judgment of the lower court rests on an adequate non-federal basis.

**STATEMENT OF FACTS**

Hereinafter the Atomic Energy Commission will be referred to as the AEC. The Idaho law pertinent to the so-called gasoline tax is hereunto appended. Idaho Code, Section 49-1201(2) imposes the duty of payment of the so-called gasoline tax upon Idaho licensed dealers.

The issue of whether dealers should pay Idaho the so-

called gasoline tax for gasoline consumed on Idaho highways on behalf of federal agencies hereto was submitted to the Comptroller General of the United States. He ruled in favor of Idaho by a letter dated November 5, 1951 (R. 74-77)', as well as by his decision which followed (R. 78-83).

The 1959 contract providing for the supplying of gasoline to the various governmental projects in Washington, Oregon, and Idaho is identical to years prior except that the parties changed one word, namely the word "included" to the word "excluded" in lines 3 and 4 (R. 250); and also there was a minor change in Item 64 (R. 260). In all other respects the contract is unchanged. No other discrimination appears between Idaho and Washington (R. 302) and Oregon (R. 282); further, the contract calls for payment of the so-called gasoline tax by all governmental agencies in Idaho (line 18, R. 252). However, appellant is suing for a refund for taxes paid to Idaho on one particular transaction, sale of gasoline to the Atomic Energy Commission (p. 1 of appellant's brief). No tax is paid in Utah (lines 3 and 4, R. 250).

The State of Idaho levied an charge for the gasoline sold under this 1959 contract. Payment was made under protest. This is a suit for reimbursement of the monies so paid under protest.

The following factual information herewith is given in order that the Court may more fully understand our position.

<sup>1</sup> Record references are to the typewritten record which has been filed with the jurisdictional statement.

The State of Idaho constructed and maintains several hundred miles of highway which are used by the general public and the AEC. Atomic City, near Arco, Idaho, and Arco, Idaho, itself, the headquarters of the AEC plant, have a combined population of 1703 persons, according to the 1960 census. Most of the workers live in or near Idaho Falls, Idaho and Blackfoot, Idaho and are transported by government buses 45 to 65 miles one way to their place of employment each day. A toll or a fee is charged each bus rider or passenger. Additionally a large fleet of other vehicles is maintained for general transportation over the many miles of highway used for the various functions of the AEC. Phillips Petroleum Company, ironically another oil company, is the major contracting company to supply maintenance and facilities to the Idaho AEC project. It also operates the aforementioned fleet of vehicles and buses (R. 381-383). The gas was ordered by Phillips Petroleum Company (R. 414).

#### QUESTIONS PRESENTED

The questions presented, which correctly were resolved by the Idaho Supreme Court, are:

1. In instances where the ultimate consumer is the government of the United States of America, can the state impose a motor fuel tax?
2. Must the State of Idaho furnish its highways free of charge to the federal government?
3. Does the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution invalidate this so-called tax as applied?

4. Where the United States and its agencies are required to make payments in lieu of taxes, may they discriminately pick and choose among the states or among the agencies within the state which payments will be made?

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and additional statutory provisions which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix hereto, are Article VII, Section 17 of the Idaho Constitution (1 Idaho Code 174) and parts of the Idaho Code, as amended: 7A Idaho Code 40-2210; 9 Idaho Code 49-1210(d), 49-1212 and 42-1241; and the Atomic Energy Act of 1954, 68 Stat. 952, 42 U.S.C. 2208. The Judiciary and Judicial Procedure Act, 28 U.S.C. 1257(2) is quoted on page 4.

#### ARGUMENT

##### I

#### THIS APPEAL IS NOT TAKEN IN CONFORMITY TO STATUTE OR TO THE COURT RULES

This case cannot be taken as an appeal to this Court. To show jurisdiction therefor, there must be " \* \* \* drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution \* \* \* " 28 U.S.C. 1257(2).

To show jurisdiction for this appeal, appellant must show that the constitutionality of the taxing statute, itself, was questioned. *Wilson v. Cook*, 327 U.S. 479, 482, and cases cited therein.

The Idaho trial court clearly passed upon the constitutional construction of how the so-called tax was levied (R. 430):



"The tax as *applied* to a sale made in Utah is a tax on interstate commerce and a violation of due process of law; in that it taxes a privilege of the plaintiff exercised outside of Idaho's jurisdictions." (emphasis supplied)

"If it is a privilege tax on plaintiff, as I here hold, its *application* in this case is still unconstitutional." (emphasis supplied)

In overruling the trial court, the Idaho Supreme Court, *American Oil Co. v. Neill*, 86 Idaho \_\_\_\_\_, 383 P.2d 350, 361, stated:

"It cannot be said that there is any discrimination between Utah Oil Refining Company as compared to a local dealer; both are subject to an identical tax burden as it relates to the importation, receiving or sale of gasoline."

Appellant's sole argument in favor of jurisdiction is found in its casting the Idaho statute into little niches so that it can take constitutional pot shots at the niches.

## II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED  
BY THIS APPEAL, AND

## III

THE JUDGMENT OF THE LOWER COURT RESTS ON  
AN ADEQUATE NON-FEDERAL BASIS

**A.** The so-called tax in question is really a *toll* and therefore must be paid regardless of whether the gas is purchased by an individual or the federal government.

The so-called tax imposed by the Idaho statute actually is a toll or assessment for payment of construction, maintenance and use of the Idaho highways.

A tax in its general connotation is a charge for sovereignty; that is to say, monies collected from a tax levy will go to the payment or support of the government itself and generally is paid into the general fund.

Distinguished from a tax is an assessment or toll which has been defined as "right of a state to lay a reasonable charge for the use of the facilities furnished." *Tirrell v. Johnson*, 86 N.H. 530, 540, 171 Atl. 642, 646-647, aff'd 293 U.S. 533.

State highways are a commodity. Consumers of this commodity must pay their fair share of the cost.

If the Highway Department of the State of Idaho were a private corporation instead of an arm of the state government there is no question that the federal government would have to pay for the use of the facility or commodity.

The toll or assessment imposed by the State of Idaho for the construction, maintenance and use of its highways does not go for the support of the general government of Idaho and thus regardless of its connotation or description in the text of the statute, it nevertheless is not a tax in the general sense of the word. The monies collected are used strictly for road purposes. Idaho Code, Sections 40-2210, 49-1210(d); 49-1212 and 49-1241; Idaho Constitution, Article VII, Section 17.

The proper test is given us by *Tirrell v. Johnson*, supra, at 530, 171 Atl. at 648, as follows:

"The charge must not interfere with the performance of the functions of the general government, and it cannot call upon that government to bear the expenses of the local government.

"Neither of these propositions afford any ground for a conclusion that the state may be called to furnish gratis to the nation anything for the use of which it is entitled for compensation from all others. Equal treatment is of course required. Beyond that, any requirement that the state give free or exceptional services to the nation would be to deny the state the protection from federal imposition of precisely the same character as that condemned when attempted by state legislation against the general government."

And see *Aero Mayflower Transit Co. v. Comm'rs*, 332 U. S. 495, 505 and cases cited therein.

*McCulloch v. Maryland*, 4 Wheat. 316, is not applicable in the case at bar simply because in that case the tax was a levy for the support of the general government. The Idaho statute makes no demand upon the federal government to contribute to the support of the Idaho government, and neither does it interfere with the function of the federal government. The money collected goes solely for highway purposes.

The federal government is to pay for what it wishes to buy or use.

"In the final analysis the case has to do with a plain business proposition. The state says to all alike: If you wish to use that which I offer for

your use, you must pay the reasonable price which I ask for such use. Like the turnpike proprietor, the state is here a public servant bound to treat all alike. But also like him in its collection of compensation—it is not a tax gatherer.

“The fact, if it were a fact, that highways are provided by the state in the exercise of purely governmental power, would not deprive the state of authority to make a reasonable charge for their use. Nor does the circumstance that they are furnished by the state rather than by a private corporation give the federal government any preferential right to use them.” *Tirrell v. Johnson*, supra, at 543, 171 Atl. at 648.

**B. The Due Process Clause of the Fourteenth Amendment has no application in this case.**

**1. The State of Idaho is not attempting to tax a transaction which took place beyond its borders.**

Appellant complains that a state has no power to tax transactions which occur outside its borders. The cases cited in support of this complaint are cases where a state tried to tax privileges or uses outside its borders. In *Union Refrigeration Transit Co. v. Kentucky*, 199 U.S. 194, the Court found that a property tax was invalid because the railroad cars permanently were located in another state. But that case is not authority for claiming a statute is unconstitutional where the goods are shipped into a state, and consumed there. Likewise, in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, a franchise tax was

levied for the privilege of doing business. The tax was found invalid because it was assessed against certain insurance contracts made in another state. In *McLeod v. Dilworth Co.*, 322 U.S. 327, a tax was held invalid because it was a sales tax imposed upon sales in another state.

The so-called tax in the case at bar is not imposed upon the passage of title or the solicitation in Idaho. The Idaho Court expressly disclaimed taxation for those particular privileges, *American Oil Company v. Neill*, 86 Idaho \_\_\_\_\_, 383 P.2d 350, 354. Nor must the State of Idaho cast its statutes into one particular form or limit it in favor of one particular incident to tax. A tax may be imposed when goods become a part of the common mass, or upon the use and enjoyment of the goods within the state, *Henneford v. Silas Mason Co.*, 300 U.S. 577. But this does not mean that title is the only taxable incident.

If considered a tax, regardless of how the contract for sale of gasoline is written this should not affect the state in taxing for the use of its highways so long as the state uses a taxable incident. Taxation goes to the substance of the matter and should not depend upon the legal niceties of the contracting parties, *Helvering v. Clifford*, 309 U.S. 331. Nor should the contractual subterfuge by the parties to shift the burden to the United States in an effort to make a tax seem a direct one, preclude this state from going to the substance of the matter. IMMUNITY CAN NOT BE CONFERRED BY THE STROKE OF A PEN. *United States v. Township of Muskegon*, 355 U.S. 484; *Barwise v. Sheppard*, 299 U.S. 33; *Curry v. United States*, 314 U.S. 14 and *Scripto, Inc. v. Carson*, 362 U.S.



Appellant's authorities absolutely fail to support their position. In spite of the host of cases dealing with gasoline taxes, appellant fails to cite any of these.

The privilege imparted in the case at bar could not possibly occur outside the State of Idaho. Instead, the collection of the toll or assessment for the use of the state highways occurred within the state. It is obvious that the use of the roads occurred within the state. The Due Process Clause has no application in the case at bar. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64; *Henneford v. Silas Mason Co.*, 300 U.S. 577; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86 and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542..

The so-called tax in question is not upon the passage of title or the privilege of the use of property outside Idaho, but is for the compensation for the maintenance, use and upkeep of Idaho highways. *American Oil Co. v. Neill*, 86 Idaho \_\_\_\_\_, 383 P.2d 350, 360; *Union Pacific R.R. Co. v. Riggs*, 66 Idaho 677, 685-687, 166 P.2d 926, 929-930; *Oregon Short Line R.R. Co. v. Pfost*, 53 Idaho 559, 574, 27 P.2d 877, 882; *Independent School District v. Pfost*, 51 Idaho 240, 246, 4 P.2d 893, 898; *Tirrell v. Johnson*, 86 N.H. 530, 171 Atl. 641, aff'd 293 U.S. 533.

Appellant attempts to show the unconstitutionality of the statute based upon a hypothetical state of facts not supported by the record (where purchase of gasoline might be made from an unlicensed Idaho dealer). This Court has held that it does not pass upon hypothetical set of facts or abstract situations, *Wilson v. Cook*, 327 U.S. 479,



480; *Smiley v. Holm*, 285 U.S. 355, 375; *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116.

If this hypothetical question was raised before the Idaho Court, that Court also considered the issue as moot, for it did not pass upon the question. We therefore do not know what constitutional construction would have been placed upon this situation in Idaho, if any. The Supreme Court of Idaho also will not determine abstract or moot questions, *Jorgensen v. George*, 56 Idaho 81, 85, 50 P.2d 1, 2; *Stockyard's Nat. Bank of Chicago v. Arthur*, 45 Idaho 333, 338, 262 Pac. 510, 512.

2. There is sufficient nexus between the State of Idaho and this appellant to make it a collector of the tax.

Any state may make a foreign corporation a collector of its taxes where there is sufficient nexus between the taxing state and the taxed corporation; *Scripto, Inc. v. Carson*, 362 U.S. 207; *General Trading Co. v. State Tax Commission*, 322 U.S. 335. In the *Scripto* case, supra, the petitioner's agent was in Florida but it had no other employees, buildings, bank account, or stock-in-trade there. Solicitation occurred by others who were residents of Florida called brokers or independent contractors. The sales were sent to Georgia, the petitioner's residence, for acceptance but in no case did money pass between the purchaser or petitioner. This Court ruled that there need only be a nexus "between a state and the person, property or transaction it seeks to tax." (362 U.S. 207 at page 211), and held the tax to be non-discriminatory. The tax was to complement the state sales tax and to prevent evasion.

According to the *Scripto* case, *supra*, the proper question to ask of the transaction in the case at bar is whether this case falls within the category of the *General Trading* case, *supra*, or the category of *Miller Bros. v. Maryland*, 347 U.S. 340.

The appellant has tried to distinguish the case at bar from the *Scripto* case. But unlike the *Miller Bros.* case, *supra*, appellant conclusively knew that the fuel was going to Idaho for use and disposal. The distinguishing factor of the *Miller Bros.* case was the lack of knowledge on the part of the seller as to where the goods were going. Moreover, unlike both the *Scripto* and *Miller Bros.* cases, the facts show appellant actually was doing business in the state. The real intent of the parties conclusively has been shown that they purchased gasoline for use on the Idaho highways.

Appellant also complains that the Idaho statute controls importation of gasoline into Idaho as a privilege of engaging in interstate commerce (p. 7, appellant's Brief). Idaho Code Section 49-1201 (1) (2) taxes only that gasoline for distribution or sale within the state. A so-called "dealer" is the only person in position to have under his control the distribution of the fuel so defined under the Act. Thus the immediate burden of collecting and paying for the construction and maintenance of the Idaho highways is upon him. The Idaho Court so found. *American Oil Co. v. Neill*, 86 Idaho \_\_\_\_\_, 383 P.2d 350, 360.

C. The issue of the Interstate Commerce Clause has no application in this case.

The power of a state to tax the use or disposal of gasoline within its boundaries as compensation for the use

of its highways is an important power, and one that is not lightly to be denied, *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177; *Kane v. New Jersey*, 242 U.S. 160. A non-discriminatory toll or assessment levied for highway purposes against all who use the highway cannot be invalid under the Commerce Clause. This is true even though the business might be wholly within interstate commerce. *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Clark v. Poor*, 274 U.S. 554; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86; *Kane v. New Jersey*, supra; and *Bingman v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626. In the *Bingman* case, supra, the Court held that a tax levied on interstate and intrastate commerce equally was valid where the tax was for the use of the state's highways.

In *Aero Mayflower Transit Co. v. Comm'rs*, supra, the Court held that a fixed flat fee tax for highway purposes exacted from all users was valid even though the plaintiff was exclusively engaged in interstate commerce. The tax was not a condition precedent to doing business in the state and was levied upon all who travel. The Commerce Clause therefore did not prevent its enforcement.

Appellant, who has the burden of proof, has not offered any evidence that the tax imposed by Idaho is discriminatory but argues at best that the tax is a direct tax on interstate commerce or a privilege of doing business (p. 12 of appellant's brief).

Appellant cites *Adams Mfg. Co. v. Storen*, 304 U.S. 307; *Robbins v. Shelby County Taxing District*, 120 U.S. 489; *Spector Motor Service v. O'Connor*, 340 U.S. 602; and *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (p.

12 of appellant's brief). These are cases involving double taxation. Such an issue is foreign to the case at bar. The issue of double taxation was not raised below and can not be considered on appeal. The appellant has argued in its brief (page 12) that interstate commerce would be subject to a double tax burden. However, by the contract Utah's gasoline tax is excluded (R. 250, 260). If Utah does not tax, as it has not in this situation, and Idaho, according to the appellant, cannot either, then we have the problem not of double taxation but of no taxation. The appellant's real argument is that it does not want to pay taxes at all. The Commerce Clause is not designed to shield the appellant from paying taxes. Thus the problem of multiple taxation and discrimination is not an issue.

This Court recently struck down arguments which, if sustained, would have placed contractors with the United States or firms using federal property at a distinct advantage by being exempted from state taxation, *City of Detroit v. Murray Corp.*, 355 U.S. 489; *United States v. Township of Muskegon*, 355 U.S. 484; *United States v. City of Detroit*, 355 U.S. 466.

A tax is non-discriminatory where it falls equally upon all who do business within the state, where it is not a condition upon doing business within the state, or where the tax is compensation for a benefit given to interstate commerce. There need only be a reasonable relationship between the tax assessed and the use of the highway, *Capitol Greyhound Lines v. Brice*, 339 U.S. 542; *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86; *Clark v. Poor*,

274 U.S. 544; *Kane v. New Jersey*, 242 U.S. 160; *Clark v. Paul Gray Inc.*, 306 U.S. 583. Interstate commerce must pay its fair share, *Aero Mayflower Transit Co. v. Comm'rs*, supra.

Appellant urges the proposition that "where a taxpayer is engaged in both interstate and intrastate business, it is not subject to direct taxation of its interstate activities, citing cases)", (p. 12 of appellant's brief). This is far too broad and cannot be supported by the cases cited by the appellant or otherwise. *Norton Co. v. Dept. of Revenue*, 340 U.S. 535; *Spector Motor Service v. O'Connor*, 340 U.S. 602; and *Adams Mfg. Co. v. Storen*, 304 U.S. 307, are not in point because they are not cases dealing with gasoline but instead with taxes which have their own special vice, such as an occupation tax, excise tax on the franchise, and the like. These taxes extract from the business a part of the earnings without any apportionment or reasonable basis for what the state does in return. *Robbins v. Shelby Taxing District*, 120 U.S. 489, also cited by appellant, is limited on its facts by *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 56-57.

The tax imposed by the State of Idaho is not new or novel but has been sustained in principal by numerous cases, *Gregg Dying Co. v. Query*, 286 U.S. 472; *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Mono-motor Oil Co. v. Johnson*, 292 U.S. 86; *Capital Greyhound Lines v. Brice*, supra; *Clark v. Poor*, supra.

Appellant presents no new federal question. This tax is equally on all who use the highway and the tax per gallon is a reasonable basis for determining the amount

of fee due to the State in relation to the use of the highway. The tax does not impose a condition to doing business nor will it subject any person taxed to multiple burdens.

D. The issue of governmental immunity is correctly decided by the lower court.

The power to tax is basic to the sovereignty of the states. Where the tax is only incidental to the function of the federal government, the state power will remain undisturbed. The mere incident of increased cost to the government does not invalidate the state power. *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; *Alabama v. King & Boozer*, 314 U.S. 1; *Curry v. United States*, 314 U.S. 14; *City of Detroit v. Murray Corp.*, 355 U.S. 489; *United States v. Township of Muskegon*, 355 U.S. 484; *United States v. City of Detroit*, 355 U.S. 466; *James v. Dravo Construction Co.*, 302 U.S. 134; *Silas Mason Co. v. Tax Commission*, 302 U.S. 186; *Alward v. Johnson*, 282 U.S. 509; *Trinityfarm Construction Co. v. Gros Jean*, 291 U.S. 466.

The recent cases of *City of Detroit v. Murray Corp.*, *United States v. Township of Muskegon*, *United States v. City of Detroit*, all supra, are adverse to appellant's contention that it is cloaked, by derivative action, with the immunity of the United States. In *United States v. City of Detroit*, supra, a real property tax was held proper. The fact that there was an increased cost to the government was of no concern, since the taxing power was held to be an incident of two sovereigns acting within their respective spheres. This Court noted also that by this tax,



the lessee was required to pay no greater tax than that placed on others similarly situated. Without such equalization, the Court said there would be a "distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility." (355 U.S. 456, 474)

In *City of Detroit v. Murray Corp. and United States v. Township of Muskegon*, both *supra*, a personal property tax on the use of governmental property was held valid. The economic burden to the United States was held to be remote, and the tax equal upon everyone.

*Alabama v. King & Boozer*, 314 U.S. 1, held that a state had authority to levy a sales tax on an independent contractor who purchased goods for governmental projects. The decision overrules prior cases such as *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218. See *Curry v. United States*, *supra*; *James v. Dravo Construction Co.*, *supra*; and *Esso Standard Oil Co. v. Evans*, *supra*.

The appellant urges *United States v. Livingston*, 179 F.Supp. 9 (E.D. S.C.) affirmed 364 U.S. 281, where DuPont by an elaborate contract with the AEC was made in effect part and parcel of the AEC. DuPont was paid only one dollar above costs each year. The company therefore had absolutely no chance to incur any gain or loss. All goods purchased were found to be integrated as if by the AEC itself, as distinguished from the other cases where goods are purchased by a contractor in the performance of its contract for the AEC or other instrumentality.

The *Livingston* case readily is distinguished from the case at bar. First, the *Livingston* case involved a property

tax which is peculiar to a general governmental function. Idaho's tax involves gasoline. Second, the *Livingston* case is not against the proposition that the AEC must pay for all services performed or materials supplied, and instead that case affirms the position of the State of Idaho. In the case at bar, it does not make any difference whether the services and materials are categorized as "goods supplied" or as "utilities," still the AEC or its contractor must pay for the use and enjoyment thereof. The *Livingston* case involves a question of taxation. The case at bar involves a commodity, namely the construction and maintenance of highways.

Also cited is *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, where it was held that a gross receipts tax did not apply to a purchase by government contractors. The gross receipts tax was a tax directly upon the United States. Such funds collected were for the local support of the government. This case did not involve gasoline or the use of services or materials in the construction and maintenance of highways.

The *Kern-Limerick* case has not met with much approval. The *Detroit* cases completely ignored it in the majority opinions. The fact that the United States is the purchaser of the goods does not control especially where the tax is indirect, *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253; *S.R.A. v. Minnesota*, 327 U.S. 558; and *Esso Standard Oil Co. v. Evans*, 345 U.S. 495.

Also for the above reasons, *United States v. County of Allegheny*, 322 U.S. 174 is not applicable to the case at bar.

E. The action by appellant, as well as the governmental agency, amounts to discrimination.

The Atomic Energy Act consents to taxation. The Act, and particularly 68 Stat. 952, 42 U.S.C. 2208, provides that the AEC shall make payments in lieu of taxes on acquired property and also payments shall be made in instances of special burdens to a state by reason of its governmental activities.

It is the intent of Congress to have its laws applied uniformly. Equality of burdens or rights is the lode star of legislation. Payments in lieu of taxes are to be uniform nationwide. *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204.

The basic philosophy of "payment in lieu of taxes" is found in the Atomic Energy Act and is patterned after the Tennessee Valley Authority Act.

The original TVA Act of 1933 allowed payment in lieu of taxes to only two states, but Congress thereafter realized the detriment to other states and broadened the statute to include all other states affected. See Senate Report 1310, on S. 2938, 76th Cong. 3rd Sess. The intent, according to the report, was to provide payments to other states and not to have discrimination among the several states. See also the Defense Housing Act, 54 Stat. 1127, as amended, 42 U.S.C. 1546. In the second opinion of the *New Castle* case, the Court held that payments were mandatory. *Mayor and Council of New Castle v. United States* (D.C. Del.), 162 F. Supp. 59 and 243.

Committee hearings and reports plainly show Congress is concerned with the loss of revenue to the states. See

Hearing before the Joint Committee on Atomic Energy, 82nd Cong., 2nd Sess. and Senate Report No. 694, 83rd Cong., 1st Sess.

The record of the case at bar is clear that the contracts for the purchase and use of gasoline for the AEC project in Idaho originally called for the payment of the state gasoline tax as required by the two decisions of the Comptroller General (R. 74 and 78). The very minor change in the 1959 contract resulted in discrimination against the State of Idaho. The contract provides for the payment of taxes in Idaho (R. 252), Oregon (R. 282) and Washington (R. 302) but the appellant argues that in one transaction alone it need not pay the "tax" or charge. Yet in all other transactions it pays the tax including a tax on gasoline consumed at the AEC works at Hanford, Washington (R. 309 and 320). In other transactions, excluding the sale of gas to the AEC in Idaho, the United States is paying the so-called tax in accordance with the Comptroller's Opinion (R. 74 and 78).

There is also discrimination within the State. Appellant argues that it should not be required to pay the so-called tax to Idaho where it sold the gasoline to the AEC but by contract, it does pay taxes on the gasoline sold to all other governmental agencies within the state.

It is inconceivable that any governmental agency would condone pin point discrimination. To have the state supply a commodity gratis for one locality at the expense of its other localities and residents is preposterous.

Congress does not intend that the government may pick and choose arbitrarily to whom it will or will not pay

taxes. By paying taxes in the one state, Washington, the United States has no grounds to complain that appellant must pay to other states as well (R. 252, 282 and 302). Congress has so ruled. Moreover, the United States has recognized that payment of taxes to the states is required.

#### SUMMARY

1. This matter improperly is taken as an appeal. The validity of the Idaho Statute has not been questioned. Instead, appellant complains about the levy made under the statute, and not otherwise.
2. All so-called gasoline tax monies collected by Idaho are used solely for road purposes.
3. Appellant and the agencies to whom appellant supplies gasoline are consuming a commodity, namely the construction and maintenance of Idaho highways; but by this suit, they are attempting to avoid payment therefore. Such action is unlawful.
4. The privilege herein imparted occurred entirely within Idaho.
5. Where all parties knew the gasoline was for Idaho and the appellant was doing business in Idaho, sufficient nexus exists to make appellant a collector of the revenue.
6. Interstate commerce must pay its fair share where the fee is required non-discriminatory.
7. The AEC has given its consent to be taxed.
8. Congress does not intend that any agency may discriminate against the states by arbitrarily picking and choosing among the states or among the agencies within the state which payments in lieu of taxes will be made. Either the agency shall pay the tax, or make payments in lieu of taxes.

**CONCLUSION**

WHEREFORE, appellees respectfully pray that this Court refuse to note jurisdiction of this cause, and the whole thereof, that appellees' hereinabove motion to dismiss be granted.

ALLAN G. SHEPARD  
*Attorney General of the  
State of Idaho*

WM. M. SMITH  
*Assistant Attorney General of  
the State of Idaho*

FABER F. TWAY  
*Chief Legal Counsel for the  
Idaho Department of Highways*



## APPENDIX

The pertinent portion of the Idaho Constitution (Idaho Code 174) is as follows:

### Article VII,

\* \* \*

§ 17. *Gasoline taxes and motor vehicle registration fees to be expended on highways.*—On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

The pertinent portions of the Idaho Code, as amended, 7A Idaho Code 40-2210; 9 Idaho Code 49-1210(d), 49-1212 and 49-1241 are as follows:

40-2210. *State highway fund—Creation.*—For the purpose of carrying out the provisions of this chapter, there is hereby created in the office of the state treasurer a separate fund to be known as the state highway fund, which fund shall include:

1. All moneys received and paid over, as hereinafter

provided, by the department of law enforcement and the county treasurers of the various counties for the registration and licensing of motor vehicles and dealers and manufacturers of motor vehicles, as hereinafter provided.

2. All fines, penalties and forfeitures incurred and collected for violations of the provisions of this chapter, as hereinafter provided.

3. All donations to the state from any source for the construction and improvement of highways.

4. All funds received from local boards under joint contracts for the construction of state highways, as hereinbefore in this act provided; and,

5. Other funds which have heretofore and may hereafter be provided by law for the construction and improvement of state highways.

49-1210

\* \* \*

(d) All moneys received from one cent of the six cents per gallon tax herein provided for shall be placed in the state highway fund to be used only for the purpose of matching federal funds for the construction, maintenance, improvement and reconstruction, of highways and farm to market roads in the state of Idaho, as provided for in federal acts.

49-1212. *Time of payment of excise tax—Distribution of proceeds—Refunds.*—Said excise tax shall be paid on or before the twenty-fifth day of each month, beginning with the first calendar month after this act becomes effective, to the collector who shall receipt the dealer there-

for, and promptly turn over the same to the state treasurer as are the other receipts of his office and the state treasurer shall place the same in the following funds, to-wit:

(a). Such sum or sums as may have been collected as tax on motor fuels sold for or used in aeroplanes shall be placed in the state aeronautics fund;

(b). An amount equal to twenty per cent of the balance of all such sum or sums as may have been collected shall be placed in the state highway treasury note redemption fund, under the provisions of chapter 3 of the Session Laws of 1929, Extraordinary Session;

(c). An amount equal to fifteen per cent of the balance of all such sum or sums as may have been collected shall be placed in the motor fuels refund fund, which is hereby created for the purpose of paying refunds under the provisions of this act. Any moneys over and above the sum of \$150,000.00 remaining in said fund on the 30th day of June of each year, shall be paid into and credited to the state highway fund and the state auditor is hereby authorized to make such transfer.

(d). The balance of all such sum or sums as may have been collected shall be paid into and credited to the state highway fund.

49-1241. *Disposition of funds.*—All taxes, interest and penalties collected under this act shall be turned over promptly to the state treasurer and the state treasurer shall place the same to the credit of the state highway fund.

The pertinent portion of the Atomic Energy Act of 1954, 68 Stat. 952, 42 U.S.C. 2208, is as follows:

Payment in Lieu of Taxes.

In order to render financial assistance to those States and localities in which the activities of the Commission are carried on, and in which the Commission has acquired property previously subject to State and local taxation the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State and local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment.

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

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**No. 701**

**THE AMERICAN OIL COMPANY, APPELLANT**

**v.**

**P. G. NEILL, ET AL.**

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO**

---

**BRIEF FOR THE APPELLANT AND THE UNITED STATES OF  
AMERICA AS AMICUS CURIAE IN OPPOSITION TO THE MOTION  
TO DISMISS**

---

In their Motion to Dismiss, appellees abandon their prior attempts to sustain the Idaho motor fuels levy as "a tax upon the 'deal,'" <sup>1</sup> For the first time, they argue (Motion, pp. 5-8) that what the statute describes as an "excise tax of six cents per gallon" imposed upon dealers who sell motor fuels outside Idaho for importation into the State (9 Idaho Code 49-1210) (J.S. 37a) is not a tax at all but is really a "toll" im-

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<sup>1</sup> Brief of P. G. Neill, et al., in the Supreme Court of the State of Idaho, p. 7.

posed upon consumers for the use of the State's highways.<sup>2</sup>

These novel contentions are in direct conflict with the decision of the highest court of the State of Idaho in this very case. It held that the levy is an "excise tax" which falls "on the 'dealers' as that term is defined by statute" (J.S. 19a). That court described the taxable incident as the "receiving" of fuel by a dealer (J.S. 8a).<sup>3</sup> This interpretation of the State statute by the highest court of the State is, of course, conclusive and binding here. *Bingaman v. Golden Eagle Lines*, 297 U.S. 626, 628; *Clement Nat'l Bank v. Vermont*, 231 U.S. 120; *Mackay Telegraph Co. v. Little Rock*, 250 U.S. 94; *Scripto v. Carson*, 362 U.S. 207. Accordingly, it is a complete answer to appellees' argument.<sup>4</sup>

<sup>2</sup> Appellees' reversal of position emphasizes the dilemma of the State taxing authorities, as explained in our Jurisdictional Statement (e.g., J.S. 14): If the tax is a sales tax, its incidence is on a transaction which occurred outside of Idaho and therefore outside Idaho's taxing jurisdiction; if the tax be deemed one on the privilege of importing fuel into the State of Idaho, it is invalid under the Commerce Clause; and if, as appellees now claim, its incidence is on the use of the fuel inside the State of Idaho, with the dealer serving merely as collector, it is invalid as a direct tax on the United States, the only user within the State.

<sup>3</sup> Similarly, the State District Court in this case characterized the tax as an excise tax whose incidence is on the dealer (J.S. 39a) - 29a).

<sup>4</sup> Appellees' remaining contentions (Motion, pp. 8-21) that the levy is consistent with the Due Process Clause of the Fourteenth Amendment and the Commerce and Supremacy Clauses similarly rest upon the erroneous premise that the levy is a toll upon consumers rather than an excise tax upon dealers.



The State court's interpretation is directly supported by the express words of the statute,<sup>5</sup> as well as by formal opinions of the Attorney General of the State of Idaho and of the Comptroller General of the United States. Thus, in an opinion of May 9, 1950, addressed to Counsel, United States Atomic Energy Commission, the State Attorney General ruled as follows:

The Motor Fuels Act does not lay a tax on any purchaser or vendee. On the contrary, it taxes the dealer or vendor. The dealer is not required to collect the tax from the purchaser \* \* \*.

The Comptroller General of the United States reached the same conclusion in decisions dated June 22, 1945 (24 Comp. Gen. 919), and November 5, 1951 (unpublished, but reproduced in full at pages 78-83 of the typewritten record filed with the Jurisdictional Statement herein). The latter states, in part (typewritten record, p. 82):

\* \* \* the tax is not laid upon the purchasers of motor fuel in Idaho but is merely a privilege tax imposed upon persons engaging in the motor fuel business within that State \* \* \*.

<sup>5</sup> The tax is described by statute as an "excise tax" payable by "each and every dealer." Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49-1210 (J.S. 37a).

<sup>6</sup> This opinion was quoted at pp. 23-24 of the American Oil Company's brief before the Supreme Court of Idaho.

<sup>7</sup> The typewritten record erroneously records the date of the 1951 decision as 1961.

<sup>8</sup> There is no basis for appellees' suggestion (Motion, pp. 2, 20) that these decisions are of help to it here. The 1951 ruling authorized payment of the Idaho Motor Fuels Tax as passed

The fact that the tax monies do not go for the support of the general government of the State but are used for road purposes does not convert the tax into a toll for the use of its highways. An identical argument was presented and rejected in *Bingaman v. Golden Eagle Western Lines*, 297 U.S. 626, where this Court held that the State levy was unconstitutional as an excise tax which imposed a direct burden upon interstate commerce.\*

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

LOUIS F. OBERDORFER,  
*Assistant Attorney General.*

STEPHEN J. POLLAK,  
*Assistant to the Solicitor General.*

I. HENRY KUTZ,  
ROBERT A. BERNSTEIN,  
*Attorneys.*

CALVIN DWORSHAK,  
*Attorney for The American Oil Company.*

MAY 1964.

on by the dealers to contractors of the Department of Agriculture with respect to sales *within* the State. The decision was based on this Court's holding in *Alabama v. King & Boozer*, 314 U.S. 1, sustaining a tax whose legal incidence was on the vendor even though the ultimate economic impact was on the United States as vendee. Since the ruling had reference to sales occurring within the State of Idaho, it cannot be construed as "in favor of Idaho" (Motion, p. 2) in this case, where the objection to the tax is that it was imposed on sales occurring in Utah, outside the jurisdiction of Idaho.

\* Appellees' reliance on *Tirrell v. Johnston*, 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533, is misplaced. *Tirrell* was a rural mail carrier who sought exemption from a State tax or

toll imposed on those who purchased gasoline for highway use. His plea was rejected on two grounds: first, because a toll, as opposed to a tax, could be exacted from a federal instrumentality; and second, because, even if the exaction were considered a tax, its incidence was not directly on the United States, since the gasoline was purchased by a private individual. This Court affirmed solely on the second ground: every case cited in the *per curiam* affirmance turned on the issue of whether the direct incidence of the disputed tax was on the federal government. It is only in the context of this issue that the *Tirrell* case has been subsequently cited as authority. See, e.g., *Taber v. Indian Territory Co.*, 300 U.S. 1, 4; *James v. Dravo Contracting Co.*, 302 U.S. 134, 163. *Clinton v. State Tax Commission*, 146 Kan. 407, 410, 71 P. 2d 857, 859; *Geery v. Minnesota Tax Commission*, 202 Minn. 366, 370, 278 N.W., 594, 596. Thus, *Tirrell* is distinguishable on two grounds: (1) the incidence of the tax (or toll) there was on the purchaser rather than the vendor; and (2) the purchaser was not the federal government, but a private contractor. Further, that branch of the holding which may be construed as standing for the proposition that a State may exact a toll, as distinguished from a tax, from the United States, was not affirmed by this Court and has apparently not been followed as a precedent by other courts.

# INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	2
1. The transactions.....	3
2. The Idaho Motor Fuels Tax Act.....	4
3. The State court decisions.....	5
Argument:	
Introduction and summary.....	7
I. The Idaho Motor Fuels Tax levied upon an Idaho dealer with respect to an out-of-State transaction wholly dissociated from any activities in Idaho violates both the Due Process Clause and the Commerce Clause.....	12
A. The Due Process Clause forbids the State to tax activities occurring outside its own borders.....	12
1. Every act performed by the dealer in connection with the transaction took place outside of Idaho.....	12
2. The fact that the vendor holds a dealer's license in the taxing State does not justify a tax upon an out-of-State transaction wholly dissociated from the vendor's local activities.....	15
B. A State excise tax on the vendor of motor fuels, based upon an out-of-State transaction wholly unrelated to any local activity, is an undue burden upon interstate commerce.....	22

Argument—Continued

II. If the Idaho tax is viewed as a levy upon the purchaser's use of the motor fuels within the State, it is invalid as a direct tax upon the United States.....	Page 24
A. A State may not tax the United States upon the use of its own property.....	24
B. Characterizing the tax as an "assessment" for the use of the State's highways does not exempt it from the constitutional prohibition.....	27
Conclusion.....	35
Appendix.....	36

CITATIONS

Cases:

<i>Aero Transit Co. v. Board of R.R. Commissioners</i> , 332 U.S. 495.....	28, 31
<i>Alabama v. King &amp; Boozer</i> , 314 U.S. 1.....	7, 9, 26, 28
<i>Anthony v. Kozier</i> , 11 F. 2d 641.....	29
<i>Atl. &amp; Pac. Tea Co. v. Grosjean</i> , 301 U.S. 412.....	13
<i>Bingaman v. Golden Eagle Lines</i> , 297 U.S. 626.....	28
<i>City of Detroit v. Murray Corp.</i> , 355 U.S. 489.....	25, 26
<i>Clinton v. State Tax Commission</i> , 146 Kan. 407, 71 P. 2d 857.....	30
<i>Connecticut General Co. v. Johnson</i> , 303 U.S. 77.....	13
<i>Eso Standard Oil Co. v. Evans</i> , 345 U.S. 495.....	23, 25, 26
<i>Geery v. Minnesota Tax Commission</i> , 202 Minn. 366, 278 N.W. 594.....	30
<i>General Motors Corp. v. Washington</i> , 377 U.S. 436.....	11, 14, 17, 18, 19, 23
<i>General Trading Co. v. Tax Commission</i> , 322 U.S. 335.....	7, 22, 25
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577.....	16, 23, 24
<i>International Harvester Co. v. Department of Treasury</i> , 322 U.S. 340.....	22
<i>Kern-Limerick Inc., v. Scurlock</i> , 347 U.S. 110.....	7, 26
<i>James v. Dravo Contracting Co.</i> , 302 U.S. 134.....	30
<i>McCulloch v. Maryland</i> , 4 Wheat. 316.....	12, 26
<i>McGoldrick v. Berwind-White Co.</i> , 309 U.S. 33.....	16
<i>McGoldrick v. Felt &amp; Tarrant Co.</i> , 309 U.S. 70.....	16

Cases—Continued

	Page
<i>McLeod v. Dilworth Co.</i> , 322 U.S. 327 .....	7
8, 13, 14, 15, 16, 22	
<i>Northwestern Cement Co. v. Minnesota</i> , 358 U.S. 450 .....	22, 23
<i>Norton Co. v. Dept. of Revenue</i> , 340 U.S. 534 .....	8,
11, 16, 17, 18, 19, 20, 21, 23, 26	
<i>Scripto V. Carson</i> , 362 U.S. 207 .....	14, 21, 25
<i>Spector Motor Service v. O'Connor</i> , 340 U.S. 602 .....	22
<i>State v. Boise City</i> , 57 Idaho 507, 66 P. 2d 1916 .....	10
<i>Taber v. Indian Territory Co.</i> , 309 U.S. 1 .....	30
<i>Tirrell v. Johnston</i> , 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533 .....	30
<i>Union Pacific R.R. Co. v. Riggs</i> , 66 Idaho 677, 166 P. 2d 926 .....	10
<i>Union Transit Co. v. Kentucky</i> , 199 U.S. 194 .....	13
<i>United States v. Allegheny County</i> , 322 U.S. 174 .....	26, 30
<i>United States v. Boyd</i> , 378 U.S. 39 .....	25
<i>United States v. City of Detroit</i> , 355 U.S. 466 .....	9, 26, 28
<i>United States v. Livingston</i> , 179 F. Supp. 9, affirmed per curiam, 364 U.S. 281 .....	30
<i>United States v. Township of Muskegon</i> , 355 U.S. 484 .....	25, 26
<i>Van Brocklin v. Tennessee</i> , 117 U.S. 151 .....	26
<i>Western Union Tel. Co. v. Kansas</i> , 216 U.S. 1 .....	22, 24
<i>Wisconsin v. J. C. Penney Co.</i> , 311 U.S. 435 .....	16
Statutes:	
23 U.S.C. 101 .....	34
23 U.S.C. 103 .....	33
Idaho Motor Fuels Tax Act, as amended (9 Idaho Code (1963 Cum. Pocket Supp.), Secs. 49-120), et seq.:	
Sec. 49-1201 .....	4, 5, 8, 10, 14, 15, 29, 36
Sec. 49-1202 (1957 ed.) .....	37
Sec. 49-1210 .....	5, 8, 15, 38
Sec. 49-1212 .....	10
Sec. 49-1218 .....	10, 38
Miscellaneous:	
24 Comp. Gen. 919 .....	9
U.S. Dept. of Commerce, Bureau of Public Roads:	
Circular Memorandum, Nov. 6, 1963 .....	33
Highway Statistics:	
Tables E-7 and E-8 .....	33
Tables SF-1, SF-4, and SF-6 .....	33



# **In the Supreme Court of the United States**

**OCTOBER TERM, 1964**

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**No. 19**

**THE AMERICAN OIL COMPANY, APPELLANT**

**v.**

**P. G. NEILL, ET AL.**

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**ON APPEAL FROM THE SUPREME COURT OF THE STATE  
OF IDAHO**

---

**BRIEF FOR THE APPELLANT AND THE UNITED STATES OF  
AMERICA AS AMICUS CURIAE**

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## **OPINIONS BELOW**

The opinion of the Supreme Court of the State of Idaho (R. 249-268) is reported at 383 P. 2d 350. The memorandum opinion of the District Court of the Third Judicial District of Idaho (R. 218-226) is not reported.

## **JURISDICTION**

Appellant brought this action for refund of taxes paid under protest on motor fuel sold to the Atomic Energy Commission. Appellant alleged that the Idaho Motor Fuels Tax Act, as amended (§9 Idaho Code, Secs. 49-1201 *et seq.*), under which the taxes were imposed, is repugnant to the United States Constitution. The Supreme Court of the State of Idaho upheld the statute.

The judgment below was entered on July 11, 1963. Notice of appeal was filed in the State Supreme Court on October 4, 1963. (R. 270.) This Court noted probable jurisdiction on June 8, 1964. (R. 272; 377 U.S. 962.) The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101.

This brief and any subsequent briefs will be filed jointly by the appellant and the United States as *amicus curiae*.<sup>1</sup> Appellant's time for oral argument will be used by the United States, with consent of counsel for appellant.

#### QUESTION PRESENTED

Whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the State for importation into the State by the United States, the State of Idaho may constitutionally impose an excise tax upon the transaction on the theory that the dealer constructively "receives" the gasoline in Idaho upon its importation by the United States.

#### STATUTE INVOLVED

The relevant portions of the Idaho Motor Fuels Tax Act, as amended (9 Idaho Code, Secs. 49-1201, *et seq.*), are set forth in the Appendix, *infra*, pp. 36-39.

#### STATEMENT

Utah Oil Refining Company<sup>2</sup> brought this action for refund of \$86,181.30 representing payments to the

<sup>1</sup> Appellant's contract for the supply of gasoline for the Atomic Energy Commission provides that the price is to be increased for any State taxes imposed. (R. 179.)

<sup>2</sup> American Oil Company, as successor to Utah Oil Refining Company, was substituted as party plaintiff. (R. 213.)

State Tax Collector of Idaho under the Idaho Motor Fuels Tax Act. The payments were made under protest on the ground that the application of the Tax Act to an out-of-state sale and delivery of gasoline to the Atomic Energy Commission would violate (1) the Due Process Clause of the Fourteenth Amendment, (2) the Commerce Clause and (3) the Supremacy Clause. (R. 4, 5, 221.)

#### 1. THE TRANSACTIONS

The General Services Administration issued an invitation for bids for the supplying of gasoline for government activities in Idaho, Montana, Oregon and Washington, for the period from November 1, 1959, through October 31, 1960. The invitation included as items 63 and 64 the supplying of 200,000 and 1,000,000 gallons of gasoline, respectively, for the Atomic Energy Commission at Idaho Falls, Idaho. Appellant transmitted formal bids from its principal offices at Salt Lake City, Utah, to the GSA office at Seattle, and its bids on items 63 and 64 were accepted in Seattle. Each bid was submitted in alternative form, quoting a price f.o.b. Salt Lake City and a price f.o.b. the AEC activity site in Idaho, and the contract awarded was for delivery f.o.b. Utah's bulk plant at Salt Lake City (R. 220, 252). The contract price did not include State taxes but was to be increased by the amount of any such taxes imposed (R. 179).

Under the contract, the AEC through its operating agent, periodically placed orders for 1,436,355 gallons, to be delivered at appellant's bulk plant at Salt Lake City. Title to the gasoline passed to the AEC upon

delivery there. Common carriers selected and paid by the AEC transported the gasoline from Utah to government-owned storage tanks in Idaho. Monthly thereafter appellant submitted the reports required by the Idaho Motor Fuels Act and paid under protest to the State Tax Collector the six cents per gallon motor fuels tax.

Utah Oil Refining Company, a Delaware corporation authorized to do business in Idaho, was a licensed dealer as defined by the Motor Fuels Act. The AEC was not, during the period in question, and never has been, the holder of an uncanceled Idaho dealer permit (R. 253).

The gasoline was consumed in motor vehicles owned by the federal government, and used in Idaho for transporting personnel connected with the AEC. Phillips Petroleum Company, under contract with the AEC, operated buses between Idaho Falls and the National Reactor Testing Station. A fee was charged for the transportation of persons using the government buses, which fee was credited to the government. Losses involved in operating the buses were fully absorbed by the government. (R. 252.)

## 2. THE IDAHO MOTOR FUELS TAX ACT

The Idaho Motor Fuels Tax Act imposes an excise tax of six cents per gallon on motor fuels. The tax is to be paid by the "dealer," who is defined by the Act as any person who first "receives" motor fuels in Idaho within the meaning of the term "received" as defined in the Act (9 Idaho Code, Secs. 49-1201, 49-

1210). The definition of "received" (9 Idaho Code, Sec. 49-1201, as amended in 1959, S.L. 1959, Ch. 75), provides, *inter alia*—

that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the State of Idaho.

The dealer is not required to pass on the tax or collect it from the person to whom he sells the fuel or from the ultimate consumer (R. 223).

Pursuant to this provision, the Idaho Tax Collector demanded that appellant, an out-of-State corporation holding a license as a "dealer" under the Idaho Tax Act, pay the motor fuels tax on its sales of gasoline in Utah to the AEC. The Company paid the taxes under protest and instituted this action for refund in the District Court of the Third Judicial District of the State of Idaho.

### 3. THE STATE COURT DECISIONS

On the basis of affidavits and exhibits filed by both parties, the district court granted summary judgment for appellant, holding that the tax is not a use tax, but rather "is basically upon a licensed dealer's privilege of first owning motor fuel in the State of

Idaho for the purpose of sale, delivery, or consumption of the same in the state"; that the taxable event is the "receipt" of the gasoline by the dealer; that under the facts of this case the tax is one on a privilege which was exercised and performed wholly outside the State of Idaho; and that, as such, its imposition is a violation of the Commerce Clause and Due Process Clause (R. 222-226).

The State Supreme Court reversed and upheld the validity of the tax. It found that title did in fact pass from appellant to the AEC at the bulk plant in Salt Lake City. The Court stated, however (R. 255):

The passage of title to the fuels is not the criterion upon which the tax operates; the incident which establishes the liability for payment of the tax by the licensed dealer is its "receiving" the fuels. The statute creates a continuing obligation on the dealer as to fuels sold, supplied, or furnished outside of this state for importation herein. This obligation of the first licensed dealer is only discharged upon its transacting of business with another licensed dealer, or by payment of the tax.

The Court held that the requirements of the Commerce and Due Process Clauses were satisfied by (1) the fact that the appellant had subjected itself to the jurisdiction and control of the State of Idaho when it became authorized to do business there, and additionally when it became an Idaho "dealer,"; and (2) the fact that the gasoline was intended for use in Idaho (R. 265).



## ARGUMENT

## INTRODUCTION AND SUMMARY

The question of the constitutionality of a State excise tax typically arises in two classes of cases: those involving the sale of goods outside the taxing State for use within that State, and those involving the sale of goods to the federal government or one of its instrumentalities. In both types of situation, the governing principles are well settled. In the first situation, a tax upon the out-of-State sale itself, or upon some privilege exercised by the out-of-State vendor in connection with the sale, is banned both by the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, albeit a tax may validly be laid upon the purchaser's in-State use and even made collectible by the vendor. Compare *McLeod v. Dilworth Co.*, 322 U.S. 327, with *General Trading Co. v. Tax Commission*, 322 U.S. 335. In the second situation, a tax upon the purchaser would run afoul of the government's constitutional immunity from State taxation, although, if the sale is an in-State transaction, a tax upon the dealer would be permissible. Compare *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, with *Alabama v. King & Boozer*, 314 U.S. 1.

The present case combines elements of both these fundamental situations. Here the appellant—a distributor of motor fuels which held an Idaho dealer's permit but did most of its business elsewhere—sold and delivered gasoline to the Atomic Energy Commission in Utah for use by the Commission at its large Idaho installation. Every act performed by

the appellant in the course of soliciting, consummating, and performing the contract took place outside of Idaho; the transaction was wholly unrelated to appellant's Idaho operations and owed nothing to any protection or benefit afforded by that State. In these circumstances, the Idaho Motor Fuels Tax is caught in an inescapable dilemma. If the legal incidence of the tax falls upon a privilege exercised by the dealer (e.g., receiving, owning, or selling the gasoline), it plainly constitutes an extraterritorial exaction forbidden by the Due Process Clause. On this assumption, it also violates the Commerce Clause by taxing the dealer's privilege of engaging in interstate commerce. *McLeod v. Dilworth Co.*, *supra*; *Norton Co. v. Dept. of Revenue*, 340 U.S. 534. On the other hand, if the statute is viewed as a tax upon the purchaser's use of the gasoline within Idaho (or, as is now contended, its use of the State's highway), it is invalid as a direct tax upon the United States.

In this unusual case, therefore, the characterization of the tax is not decisive of its validity, but merely identifies the particular constitutional reef upon which the tax founders. It is nonetheless important, for purposes of analysis, to ascertain the legal incidence of the tax and, more particularly, to determine whether it falls upon the dealer or upon the purchaser or user.

The Idaho Motor Fuels Tax is described by statute as "an excise tax," payable by licensed "dealers," upon motor fuels "received" by them, as that term is defined in the statute (9 Idaho Code, 49-1210, 49-1201). Unlike the customary "use" tax, which is

imposed on the user and merely "collected" by the vendor, the Idaho statute contains no provision requiring the vendor to pass on or collect the tax from his customers, and no provision making the customers ultimately responsible for payment of the tax. While the dealer may choose to shift the economic burden of the tax to the purchaser, he does not thereby shift its legal incidence. Cf. *Alabama v. King & Boozer*, 314 U.S. 1; *United States v. City of Detroit*, 355 U.S. 466. On its face, therefore, the Act seems clearly to impose a tax upon the dealer, not the purchaser.

This view of the Act was adopted by the Attorney General of Idaho in a formal ruling (opinion dated May 9, 1950, addressed to Counsel, United States Atomic Energy Commission, quoted at pp. 23-24 of American Oil Company's brief before the Supreme Court of Idaho), which stated as follows:

The Motor Fuels Tax Act does not lay a tax on any purchaser or vendee. On the contrary, it taxes the dealer or vendor. The dealer is not required to collect the tax from the purchaser \* \* \*.

The Comptroller General of the United States reached the same conclusion in decisions dated June 22, 1945 (24 Comp. Gen. 919), and November 5, 1951 (R. 19-27), and on the basis of that conclusion authorized payment of the Idaho Motor Fuels Tax, as passed on by dealers to contractors of the Department of Agriculture; with respect to sales occurring within the State of Idaho.

In accordance with the plain language of the Act, and with its interpretation by the State Attorney General, the trial court here regarded the levy as a

privilege tax on the dealer rather than a use tax on the consumer (R. 222-223, 226). The tax, it declared, "is basically upon a licensed dealer's privilege of first owning motor fuel in the state of Idaho for the purpose of sale, delivery, or consumption of the same in the State, except in a factual situation such as is here involved" (R. 222-223).<sup>3</sup>

The Supreme Court of Idaho apparently concurred in this view, declaring that the Act places "the immediate burden of the tax on those who are first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' as that term is defined by the statute" (R. 265). There are also other indications in the opinion that the court believed the legal incidence of the tax to be upon the dealer (see *infra*, pp. 28-29). On the other hand, the court also stated, as it had in earlier cases, that the *purpose* of the tax was "to exact a proportionate amount from the users of the highways of this state for a specific purpose,—that of building and maintaining public highways within the state"<sup>4</sup> (R. 265).

<sup>3</sup> In all cases except the one at issue here, liability for payment is laid upon a "dealer" or "person" who is the owner of the fuel at some point in time when the fuel is physically located in Idaho. 9 Idaho Code, 49-1201.

<sup>4</sup> See, also, *Union Pacific R.R. Co. v. Riggs*, 66 Idaho 677, 166 P. 2d 926; *State v. Boise City*, 57 Idaho 507, 66 P. 2d 1016. Consistent with that purpose, the Act directs that the monies collected through the tax are to be paid into and credited to the state highway fund (9 Idaho Code, 49-1212). It also authorizes refunds to those purchasers to whom the dealer has passed on the tax and who can show that the gasoline they bought was not used in motor vehicles operated or intended to be operated on Idaho's highways (9 Idaho Code, 49-1218 (a) and (b)).

While the court's decision is therefore not free from ambiguity, its interpretation of the statute would seem to coincide with that of the trial court, which stated (R. 223):

While it may be the overall policy of the state to collect a tax of 6¢ per gallon on all gasoline used to propel motor vehicles over Idaho state highways, the taxable event or transaction is not the use by the local consumer or purchaser, but the "receipt" of the gas by the dealer.

\* \* \*

While in our view the legal incidence of the Idaho tax is clearly upon the dealer, rather than upon the consumer, we shall discuss the constitutional issues on both assumptions. In Point I, we adopt the premise that the levy is a privilege tax on the dealer. We demonstrate that the tax, so viewed, violates the basic jurisdictional principle, embodied in the Due Process Clause, that a State has no power to tax transactions and activities which take place outside its own borders and with which it has no nexus. We further show that neither appellant's status as a licensed dealer in Idaho, nor the fact that it does business in that State, justifies the imposition of a tax upon an out-of-state transaction, such as this, which is wholly dissociated from appellant's local activity. *Norton Co. v. Dept. of Revenue*, 340 U.S. 534. See, also, *General Motors Corp. v. Washington*, 377 U.S. 436. Similar considerations, we argue, condemn the tax under the Commerce Clause.

In Point II, we adopt the alternative—and, we believe, incorrect—assumption that the incidence of the

tax is upon the purchaser and its use of the gasoline in Idaho. On that hypothesis, the statute, as here applied, taxes an agency of the federal government upon the use of its own property. Such a tax clearly contravenes the long-settled principle that the United States, its property, functions, and activities are not subject to state taxation. *McCulloch v. Maryland*, 4 Wheat. 316. We deal next with the novel contention—advanced for the first time in this Court—that the Idaho tax is in essence a “toll or assessment” exacted from consumers in payment for the use of the State’s highways, and that the government’s constitutional immunity does not shield it from a “compensatory” exaction such as this is alleged to be. In reply, we show that there is no sound basis for the appellees’ characterization of the tax, and that even if there were, the principle of federal governmental immunity from State taxation would apply to this, as to any other, tax.

I. THE IDAHO MOTOR FUELS TAX LEVIED UPON AN IDAHO DEALER WITH RESPECT TO AN OUT-OF-STATE TRANSACTION WHOLLY DISSOCIATED FROM ANY ACTIVITIES IN IDAHO VIOLATES BOTH THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE

A. THE DUE PROCESS CLAUSE FORBIDS THE STATE TO TAX ACTIVITIES OCCURRING OUTSIDE ITS OWN BORDERS

1. *Every act performed by the dealer in connection with the transaction took place outside of Idaho*

It is well settled that the Due Process Clause of the Fourteenth Amendment forbids a State to tax activities or transactions which occur outside its borders. *Union Transit Co. v. Kentucky*, 199 U.S. 194; *Con-*



*necticut General Co. v. Johnson*, 303 U.S. 77.<sup>5</sup> The appellant's transfer of gasoline to the Atomic Energy Commission was unquestionably an out-of-state transaction *vis-a-vis* Idaho. Each and every phase of the transaction in which the appellant participated had its locus outside of Idaho: invitations for bids were issued by the government in Seattle, Washington; appellant submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; appellant delivered the gasoline to carriers selected by the government at appellant's bulk plant in Salt Lake City, and it was there that title passed. Not a single act performed by appellant in the course of soliciting, consummating, and performing the contract of sale took place in Idaho or was in any manner dependent upon the grace of that State. The Due Process clause therefore bars the imposition of any tax upon the appellant with respect to this transaction.<sup>6</sup>

It is immaterial, in these circumstances, which aspect of the transaction is treated as the "taxable event." A tax upon the sale itself—the transfer of title or possession—would undeniably be invalid under *McLeod v. Dilworth Co.*, 322 U.S. 327.<sup>7</sup> The Idaho

<sup>5</sup> Nor may a State tax the exercise in another State of any right or privilege derived from the laws of that State. *Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424.

<sup>6</sup> The transaction could, of course, be taxed by the State of Utah. However, there is no Utah tax applicable to the sale.

<sup>7</sup> That decision appears to have been grounded on the Commerce Clause rather than upon the Due Process Clause. As

tax stands on no better footing merely because its nominal subject is the "receiving" of fuels by the dealer—or, as the trial court put it, the "licensed dealer's privilege of first owning motor fuel \* \* \* for the purpose of sale, delivery, or consumption of the same" in Idaho (R. 222-23). Here the "receiving" presumably took place in Salt Lake City and had even less to do with Idaho than did the subsequent sale.

Idaho seeks to avoid this constitutional barrier by resort to a bald fiction. The statute provides that (49-1201(g)):

\* \* \* motor fuel which is in any manner supplied, sold or furnished \* \* \* by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho. \* \* \*

Obviously the constitutional reach of a State's taxing power is not determined by such make-believe. Indeed, the language quoted above merely shows how

Mr. Justice Rutledge pointed out in his concurring opinion (322 U.S. 349, 353), the two provisions "are not always sharply separable in dealing with these problems" and are overlapping in content. The Court has often referred to them interchangeably or accumulatively in discussing that the power of a State to tax transactions which both arise in interstate commerce and are alleged to lack sufficient contacts with the taxing State. See, e.g., *Scripto v. Carson*, 362 U.S. 207, 208; *General Motors Corp. v. Washington*, 377 U.S. 436, 437.

little the Idaho motor fuel tax, as here applied, differs from the sales tax struck down in *McLeod v. Dilworth Co.*, *supra*. For when Section 49-1210 is read together with Section 49-1201(g), it becomes apparent that this exaction is nothing more than "an excise tax \* \* \* on all motor fuels \* \* \* supplied, sold, or furnished \* \* \* by an Idaho licensed dealer, for importation into the state of Idaho \* \* \*." In reality, therefore, the event which makes the tax operative here is not the appellant's "receiving" of motor fuels in Idaho—for that never happens—but rather its act of selling or supplying motor fuels in Utah for importation into Idaho. And that event lies beyond Idaho's power to tax.

2. *The fact that the vendor holds a dealer's license in the taxing State does not justify a tax upon an out-of-State transaction wholly dissociated from the vendor's local activities*

The court below found two "local incidents" sufficient to bring this transaction within Idaho's taxing power (R. 265):

(1) that the appellant had sold the gasoline with knowledge that it would be imported into, and used within, Idaho by the Atomic Energy Commission;

(2) that the appellant had been authorized to do business in Idaho and had applied for and received a dealer's license permitting it to "enter into the Idaho market as a distributor of motor fuels."

In our view, neither of these factors affords any basis for sustaining Idaho's contention that this out-of-State transaction is subject to its taxing powers. The first proposed nexus merits little discussion. More

than once this Court has struck down a sales or gross receipts tax upon transactions which it held to be insufficiently related to activities within the taxing State, despite the fact that the vendor well knew that the goods were destined for use in that State and indeed shipped them there himself. See *McLeod v. Dilworth Co.*, *supra*; *Norton Co. v. Dept. of Revenue*, 340 U.S. 534. And in those cases in which the Court has upheld taxes upon in-shipments from a point outside the taxing State, it has done so exclusively on the ground that the direct burden of the levy was laid on some incident, activity or use within the State. Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577; *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, and *McGoldrick v. Felt & Tarrant Co.*, 309 U.S. 70.

It is equally plain that neither appellant's status as a licensed dealer in Idaho nor the fact that it engaged in business there will suffice to sustain the tax on this particular transaction. Appellant plainly did not need Idaho's permission in order to make this sale. It exercised no privilege which Idaho had power to grant or withhold, and availed itself of no opportunity or benefit for which Idaho reasonably can seek return. See *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444.

Thus, the court below was entirely inaccurate in stating that the Idaho dealer's permit authorized appellant "to engage in the very activity it now claims to be exempt from the tax" (R. 265). With respect to the present transaction, the fact that appellant happened to hold an Idaho dealer's permit was

purely fortuitous. There were other Utah distributors which did not; and had the United States chosen to purchase gasoline from one of those concerns, Idaho would have had no statutory, let alone constitutional, basis for imposing a tax, albeit its relationship to the transaction would have been no more tenuous than it is here.

Two decisions of this Court make clear that a company authorized to do, and doing, business in the taxing State cannot be taxed on interstate transactions which are wholly unrelated to its in-State activities. *Norton Co. v. Dept. of Revenue*, 340 U.S. 534; *General Motors Corp. v. Washington*, 377 U.S. 436. In the *Norton* case, a Massachusetts corporation maintained a branch office and warehouse in Chicago, from which it made local over-the-counter sales at retail. In addition, it made sales to Illinois customers from its Worcester headquarters—some based on orders or filled by shipments routed through the Chicago outlet; other based on orders sent directly to Worcester and filled by direct shipments of goods from Worcester to the Illinois customer. Illinois sought to impose its retail tax on the gross receipts derived by Norton from all its sales to Illinois residents, whether or not connected with the Chicago outlet. This Court stated (at 537) that when a corporation has gone into a State to do local business by State permission, it can avoid taxation on some of its sales “only by showing that particular transactions are dissociated from the local business and interstate in nature.” On that basis, the Court



concluded that Illinois could reasonably apply its tax to those sales which utilized the Chicago branch either in receiving the orders or distributing the goods, since Norton "had not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market" (*id.* at 538). It further held, however, that those "orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester" were "so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business" (*id.* at 539).

The *General Motors* case involved essentially the same issue. General Motors sold vehicles, parts, and accessories at wholesale to independent dealers in Washington. Some sales were made through a warehouse operated by General Motor Parts Division in Seattle or through a one-man branch office in Seattle maintained by Chevrolet; most of the sales, however, resulted from orders which were sent by Washington dealers directly to the corporation's zone office at Portland and were filled by direct shipments to the dealers from the factory. Washington levied a tax upon the unapportioned gross receipts derived by General Motors from all of its deliveries in the State. In sustaining the tax, this Court stated, as it had in *Norton*, that the burden is on the taxpayer to show that the transactions claimed to be exempt are "dissociated from the local business and interstate in character"; the test, it said, is "whether the State has exerted its power in proper proportion to appellant's



activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded" (377 U.S. at 441).

Applying that criterion, the Court stressed that the company had "district managers, service representatives and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured" (p. 447). The district managers supervised and helped to train and organize the dealers' sales forces; the service representatives performed somewhat similar functions for the dealers' service departments. All of these activities were directed toward retaining and enlarging General Motors' market in Washington, and thus played a role in promoting the very sales, including those in Portland, which Washington sought to tax. The Court concluded, therefore, echoing its language in *Norton*, that General Motors had failed to establish that the in-State activities "were not decisive factors in establishing and holding this market" (*id.* at 448).

When these standards are applied to the present case, it is plain that the bulk sale of gasoline to the Atomic Energy Commission was wholly "dissociated" from appellant's activities in Idaho and owed nothing whatever to "the opportunities and protections which [that] State has afforded." The sale grew out of an invitation for bids to supply gasoline to certain government agencies in four States, issued by the General Services Administration at its Seattle office; the an-

swering bid was transmitted from appellant's principal offices in Salt Lake City to Seattle and there accepted. There is no reason to suppose that appellant's dealership activities in Idaho contributed in any way to the procurement or performance of this contract. Indeed, the connection between appellant's presence in Idaho and the out-of-state sale here in issue was far more remote than the corresponding relationship in *Norton*. Both the majority and the dissenters in *Norton* noted (340 U.S. at 538, 541) that the Chicago outlet was the company's only source of "customer relationship" in the Illinois market; afforded the only means by which the company could be reached with process in local courts by aggrieved Illinois customers; and provided service to, or replacement of, defective machines, whether or not purchased through the Chicago warehouse itself. Here, none of those links is present. The government's bulk purchase, achieved through a formal bidding procedure carried on wholly outside of Idaho, in no way depended upon "customer relationship" with appellant's outlets or personnel in Idaho. Moreover, having purchased fuel, rather than machinery (as in *Norton*), the government will have no occasion to call upon appellant for servicing or replacement. And appellant's amenability to service of process in Idaho is scarcely significant; should the government ever find it necessary to bring legal action against appellant, it would have a wide choice of forums (including Utah), and (unlike Norton's retail customers in Illinois) might well deem it less convenient to sue in

Idaho than elsewhere. In short, if the functions performed by the Chicago outlet in *Norton* were insufficient to justify a tax on the Worcester transactions, *a fortiori* appellant's dealership in Idaho will not support the extra-territorial levy here sought to be imposed.

*Scripto v. Carson*, 362 U.S. 207, upon which the court below primarily relied (R. 264-265) is not inconsistent with these conclusions. There, a Georgia corporation having no place of business or regular employees in Florida, continuously solicited sales in that State through independent brokers or jobbers. Orders were forwarded by these solicitors to Georgia for acceptance there and were filled by shipments of goods directly to the Florida customers. In view of this continuous local solicitation, the Court held that Florida could constitutionally require the Georgia vendor to collect from its Florida customers the tax imposed by Florida upon their use of those products within the State.

That holding is plainly inapplicable to the present case. In *Scripto*, the company's solicitation activities in Florida generated the very transactions to which the tax pertained; here, on the other hand, the transaction sought to be taxed was not the product of solicitation or any other activities in Idaho. Furthermore, the question presented in *Scripto* was not, as here, whether Florida could levy a tax on the Georgia vendor, but whether it could require the vendor to collect for the State a concededly valid use tax levied upon the Florida purchaser. The decisions of this

Court make clear that the kind of nexus which justifies the collection requirement will not necessarily warrant the imposition of a tax whose incidence is upon the out-of-state vendor. Compare *McLeod v. Dilworth Co.*, 322 U.S. 327 with *General Trading Co. v. Tax Commission*, 322 U.S. 335.

B. A STATE EXCISE TAX ON THE VENDOR OF MOTOR FUELS, BASED UPON AN OUT-OF-STATE TRANSACTION WHOLLY UNRELATED TO ANY LOCAL ACTIVITY, IS AN UNDUE BURDEN UPON INTERSTATE COMMERCE.

While the transaction was, as we have shown, an "out-of-State" transaction with respect to Idaho, it was followed, as the parties contemplated that it would be, by a movement of goods across State lines into Idaho. The transaction might well be viewed, therefore, as one "in interstate commerce." If it be so regarded, the same considerations which render the Idaho motor fuels tax invalid under the Due Process Clause also condemn it under the Commerce Clause as an undue burden upon interstate commerce.<sup>8</sup> It is beyond dispute that a State may not lay a tax on the privilege of engaging in interstate commerce, *Spector Motor Service v. O'Connor*, 340 U.S. 602; *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 458. On the other hand, a State is free to levy upon activities

<sup>8</sup> In his separate opinion (322 U.S. 349) concurring in *General Trading Co. v. Tax Commission*, *supra*, and *International Harvester Co. v. Department of Treasury*, 322 U.S. 840, and dissenting in *McLeod v. Dilworth Co.*, *supra*, Mr. Justice Rutledge stated (at 358): "Due process" and "Commerce clause" conceptions are not always sharply separable in dealing with these problems." Cf., e.g., *Western Union Tel. Co. v. Kansas*, 216 U.S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the States becomes undue.

conducted within its borders, even when those activities give rise to, or are integrally connected with, interstate commerce. See, *e.g.*, *Henneford v. Silas Mason Co.*, 300 U.S. 577; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; *Northwestern Cement Co. v. Minnesota*, *supra*; *General Motors Corp. v. Washington*, 376 U.S. 436. In the present case, however, there simply is no in-state "handle" for Idaho to grasp. As we have seen, every aspect of this transaction in which the appellant participated took place outside of Idaho. In these circumstances, the Idaho statute, as here applied, can only be regarded as a tax upon the privilege of engaging in interstate commerce or as a direct tax upon the interstate movement of goods itself. Indeed, the statute itself describes the taxable event—the receipt of motor fuel by an Idaho licensed dealer—as the sale by such dealer "for importation into the state of Idaho from a point of origin outside the state \* \* \*" (p. 5, *supra*).

This conclusion is not altered by the fact that the appellant held a dealer's license in Idaho and was authorized to do business there. We recognize that a State may tax the privilege of doing business and may include in the measure of that tax the income (or gross receipts) derived from all transactions, including interstate transactions, growing out of activities within its borders. *General Motors Corp. v. Washington*, *supra*; *Northwestern Cement Co. v. Minnesota*, *supra*. At the same time, however, the State must rigorously exclude from the computation of the tax those interstate operations which, as in the case here, are unrelated to any of the taxpayer's local activities. *Norton Co. v. Dept. of Revenue*, 340 U.S.



534. A contrary rule would discriminate against interstate commerce; for it would enable the State to exact a higher price for its permission to do business from a company with interstate operations than from a purely intrastate company, although the local activities of each yielded an identical amount of income (or gross receipts). Virtually the same evil was condemned by this Court in *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, in which a State franchise tax measured in part by the value of the taxpayer's property outside the State was held to be a direct burden on the company's interstate operations.

II. IF THE IDAHO TAX IS VIEWED AS A LEVY UPON THE PURCHASER'S USE OF THE MOTOR FUELS WITHIN THE STATE, IT IS INVALID AS A DIRECT TAX UPON THE UNITED STATES \*

A. A STATE MAY NOT TAX THE UNITED STATES UPON THE USE OF ITS OWN PROPERTY

We have assumed thus far—correctly, we believe—that the legal incidence of the Idaho tax is upon the dealer. If, on the other hand, the tax be viewed as a levy upon the purchaser's privilege of using motor fuel within the State of Idaho, the statute founders upon another constitutional reef. To be sure, neither the Due Process Clause nor the Commerce Clause precludes a State from taxing the purchaser's use, within the State's borders, of goods which have come to rest after completion of an interstate shipment. *Henneford v. Silas Mason Co.*, 300 U.S. 577. And where the taxing State has a sufficient nexus with the sales transactions—e.g., where the seller is operating a



sales organization within the State—it can require the out-of-state vendor to collect the taxes for it. *Scripto v. Carson*, 362 U.S. 207; e.g., *General Trading Co. v. Tax Commission*, 322 U.S. 335. In the present case, however, the purchaser of the goods was not a private party, but an agency of the federal government. Title to the gasoline passed to the United States prior to shipment into Idaho, and the fuel was consumed within the State in vehicles owned by the United States.\* No proposition is better established

\* Appellees originally took the position that Phillips Petroleum Company (which operated the buses in which the fuel was used), and not the United States, was the actual purchaser and user of the fuels (R. 221). Their aim, however, was not to establish that the incidence of the tax was on Phillips Petroleum Company as user, but, rather, that the sale was in substance one from appellant to Phillips Petroleum Company within Idaho (R. 221). The Idaho Supreme Court found, as is clearly the case, that title did in fact pass from appellant to the United States in Utah (R. 255). It found further that "The status of Phillips Petroleum Company, as a licensed dealer, is immaterial to this decision" (R. 253). Hence, the fact that the United States was the owner and consumer of the gasoline would appear to be here not open to challenge.

It is true, of course, that under certain circumstances, and under a statute designed to that end, a private contractor may be taxed for the use of property owned by the United States. *United States v. Township of Muskegon*, 355 U.S. 484; *City of Detroit v. Murray Corp.*, 355 U.S. 489; *United States v. Boyd*, 378 U.S. 39; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495. But it is not necessary to consider whether Idaho might constitutionally impose a motor fuel tax on Phillips Petroleum Company under the circumstances here—since, as noted above, appellees have never contended that the instant tax was imposed on Phillips Petroleum Company, and the opinion of the Idaho Supreme Court expressly disclaimed any such basis for its decision. Compare, for example, the very different type of statute involved in *Boyd, supra*, or *Esso Oil, supra*.

than that the property, functions, and activities of the United States and its instrumentalities are immune from taxation by the States. *McCulloch v. Maryland*, 4 Wheat. 316; *Van Brocklin v. Tennessee*, 117 U.S. 151; *United States v. Allegheny County*, 322 U.S. 174; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110. A State tax upon the government for the use of its own property would clearly violate this settled constitutional prohibition.

Furthermore, if a State cannot constitutionally impose a use tax upon the United States, it necessarily follows that it cannot require a private vendor to collect from the government that impermissible tax. It is true, of course, "that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (emphasis added). *United States v. City of Detroit*, 355 U.S. 466, 469. Accord, *United States v. Township of Muskegon*, 355 U.S. 484; *City of Detroit v. Murray Corp.*, 355 U.S. 489; *Alabama v. King & Boozer*, 314 U.S. 1; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495. That precept, however, presupposes that the legal incidence of the tax, as distinguished from the ultimate economic burden, is upon the private contractor, rather than the government. In each of the cases cited, this Court recognized, implicitly or explicitly, that a State cannot lay a tax upon the United States or its property; in each case it sustained the tax in question only upon concluding that

its legal onus was on some privilege exercised by the contractor. Thus, on the premise that the Idaho tax is imposed on the user—and merely “collected” from the dealer—the cases cited above do not support, and indeed further undermine, the validity of the imposition.

**B. CHARACTERIZING THE TAX AS AN “ASSESSMENT” FOR THE USE OF THE STATE’S HIGHWAYS DOES NOT EXEMPT IT FROM THE CONSTITUTIONAL PROHIBITION**

In their brief in the court below (p. 10), appellees maintained that the Idaho Motor Fuels Tax “clearly is nothing more than a privilege tax upon the dealers.” They now have abandoned that position. In their Motion to Dismiss this appeal, they argued for the first time that what the statute describes as “an excise tax” payable by licensed “dealers” on each gallon of motor fuels “received” (or constructively “received”) by them in Idaho is, in reality, a “toll or assessment” exacted from consumers as payment to the State for use of its highways. They further contend that the government’s constitutional immunity from State taxation does not exempt it from a purely “compensatory” exaction such as this is alleged to be. There is no sound basis, we submit, either for the appellees’ characterization of the tax or for the novel exception they seek to engraft upon the principle of inter-governmental tax immunity.

The fact that the Idaho Motor Fuels Tax Act does not require the dealer to pass on or collect the tax, and does not make the purchaser liable in any way for its payment, would seem a decisive indication that the operative incidence of this levy is upon the dealer,

rather than upon the consumer.<sup>10</sup> The dealer may or may not choose to shift the economic burden of the tax to his customers, but in no event can he shift its legal incidence. Cf. *Alabama v. King & Boozer*, 314 U.S. 1; *United States v. City of Detroit*, 355 U.S. 466. The Attorney General of Idaho, the Comptroller General of the United States, and the trial court in the instant case have explicitly ruled this to be a privilege tax imposed upon the dealer. The decision of the Supreme Court of Idaho is less precise. But while noting that the ultimate purpose of the statute was to obtain from highway users the funds needed to build and maintain the State's roads, the court further declared that the means chosen to achieve that end was a levy "placing the immediate burden of the tax on those first in a position to control the distribution of the motor fuels throughout the state—on the 'dealers' \* \* \*" (R. 265). Significantly, moreover, the court made no attempt to sustain the tax on the theory now

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<sup>10</sup> The fact that the proceeds of the tax were required by statute to be paid into the State highway fund is not decisive of its legal character. In *Bingaman v. Golden Eagle Lines*, 297 U.S. 626, this Court held that a New Mexico excise tax on gasoline was not a charge for the use of the highways, despite the fact that the funds were devoted by statute to the building and maintenance of those highways, and therefore could not validly be exacted from a motor carrier engaged solely in interstate commerce. Conversely, in *Aero Transit Co. v. Board of RR Commissioners*, 332 U.S. 495, Montana taxes imposed on motor vehicles operated by common carriers were held to be consideration for the use of the State's highways, and therefore valid even as applied to an interstate carrier, albeit the proceeds of the taxes were not earmarked for highway purposes but went into the State's general fund.

advanced by the appellees. Nor did it suggest that the trial court, or the parties, had misconceived the nature of the tax in regarding it as a privilege tax upon dealers. Nearly the whole of its opinion was addressed to questions pertaining to the Due Process and Commerce Clauses—questions which would have only secondary importance (see *infra*, p. 32) if this were truly a tax or “assessment,” upon the United States. In turning finally to the question of the government’s constitutional immunity, the court below concluded merely “that the tax immunity of the Atomic Energy Commission, if such there be, does not extend to the contractor furnishing the supplies. See: *Esso Standard Oil Co. v. Evans*, 345 U.S. 495. \* \* \*; *Alabama v. King & Boozer*, *supra* \* \* \*” (R. 268). As we have shown, the principle thus invoked by the court, and the authorities cited in support of it, are applicable to the present case only on the assumption that the legal incidence of the Idaho exaction is upon the appellant, and not upon the government.

But even if the appellees were correct in their characterization—that is to say, even if the exaction were viewed as a tax upon the purchaser for the privilege of using the State’s highways—the levy would be barred as a direct tax upon the government. We note, first, that in no event can this imposition be regarded as a “toll” in the accepted sense of that term, i.e., a specific charge for a specific use of a particular bridge, tunnel, or stretch of highway, exacted upon each occasion of such use and as a prerequisite thereto. Cf. *Anthony v. Kozer*, 11 F. 2d 641, 645 (D.C. Ore.). The government customarily pays true



tolls, just as it would pay for gas or electricity purchased from a State or municipality. Both in form and in substance, however, the exaction imposed by the State of Idaho, in the present case is a tax, rather than a toll.

The principle that the United States, its property, its essential functions and activities are not the subject of taxation by the States "has not been questioned in modern times." *United States v. Livingston*, 179 F. Supp. 9, 19 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281. "[T]his Court never has departed from that basic doctrine or wavered in its application." *United States v. Allegheny County*, 322 U.S. 174, 176. Nor has the Court ever intimated that the applicability of the doctrine is dependent upon the particular purpose for which the State levies the tax.<sup>11</sup> Appellees argue that the government's im-

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<sup>11</sup> Appellees' reliance (Motion, pp. 6-8, 10) on *Tirrell v. Johnston*, 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533, is misplaced. *Tirrell* was a rural mail carrier who sought exemption from a State tax or toll imposed on those who purchased gasoline for highway use. His plea was rejected on two grounds: first, because a toll, as opposed to a tax, could be exacted from a federal instrumentality; and second, because, even if the exaction were considered a tax, its incidence was not directly on the United States, since the gasoline was purchased by a private individual. This Court affirmed solely on the second ground: every case cited in the *per curiam* affirmation turned on the issue whether the direct incidence of the disputed tax was on the federal government. It is only in the context of this issue that the *Tirrell* case has been subsequently cited as authority. See, e.g., *Taber v. Indian Territory Co.*, 300 U.S. 1, 4; *James v. Dravo Contracting Co.*, 302 U.S. 134, 163. *Clinton v. State Tax Commission*, 146 Kan. 407, 410, 71 P. 2d 857, 859; *Geery v. Minnesota Tax Commission*, 202 Minn. 366, 370, 278 N.W. 594, 596. Thus, *Tirrell* is distinguishable



munity ought not protect it from a tax, or "assessment," intended merely to reimburse the State for a specific class of facilities or services it has provided. In varying degrees, however, nearly all taxation involves the element of "compensation." On the theory now proposed, it could as well be argued that the government must submit to a real property tax designed to compensate the State for police and fire protection, street and sidewalk maintenance, and other benefits which are provided to—and (in the only sense relevant to such services)<sup>12</sup> used or enjoyed by—the government in common with other property owners. Yet such a tax would plainly be impermissible.

Appellees' reliance on *Aero Transit Co. v. Board of RR Commissioners*, 332 U.S. 495, and cases cited therein, is misplaced. Those cases held that a State

on two grounds: (1) the incidence of the tax there was on the purchaser rather than the vendor; and (2) the purchaser was not the federal government, but a private contractor. Further, that branch of the holding which may be construed as standing for the proposition that a State may exact a toll, as distinguished from a tax, from the United States, was not affirmed by this Court and has apparently not been followed as a precedent by other courts.

<sup>12</sup> Police and fire protection is not "used" by property owners merely on those rare occasions when a burglar breaks in or a fire breaks out. The deterrence of crime, surely the most important function of a police force, is a benefit continuously enjoyed by every property owner, including the government. The government also derives the same benefit as any urban or suburban property owner from the constant availability of the municipal fire department, and on the appellees' theory should pay a pro rata share of the costs of maintaining that department.

has the right, consistently with the Commerce Clause, to impose a non-discriminatory tax as compensation for use of its highways, even upon owners and operators of motor vehicles engaged exclusively in interstate commerce. That rule is merely a specific application of the more general principle that, while a State may not tax the privilege of engaging in interstate commerce as such, it may require a company so engaged to pay a tax upon its in-State activities in return for the benefits made available to it by the State. In other words, interstate commerce may be required to "pay its own way." But if the doctrine of intergovernmental tax immunity means anything, it means that the United States may *not* be compelled to "pay its own way"—may not, that is, be subjected to taxation, however non-discriminatory, upon its activities and operations within the State.

In the final analysis, the appellees' argument comes down to the contention that it would simply be unfair to relieve the government of its proportionate share of the costs of building and maintaining the State's highways, thereby loading a disproportionate share of these costs upon private users. We do not believe that the application of the principles relating to tax immunity can be made to depend on a balancing of equities. But even if equitable considerations were thought to bear upon the proper resolution of this issue, we would dispute any suggestion that the equities here favor the application of the tax.

A very substantial proportion of the funds used to construct Idaho's highways is supplied by the Federal

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Highway Trust Fund in the form of matching fund grants. In the case of highways within the "Interstate System" (the National System of Interstate and Defense Highways, 23 U.S.C. 103(d)) the federal contribution is 92 percent; in the case of other federal-aid highways (23 U.S.C. 103 (b) and (c)), it is 63 percent.<sup>13</sup> During the five-year period 1959-1963, the State of Idaho expended an average of \$42,000,000 per year for the construction and maintenance of its highways; during the same period it received an annual average of \$23,000,000—roughly 55 percent of its total highway budget—from the federal government through the Federal Highway Trust Fund.<sup>14</sup> Moreover, the average annual contribution of Idaho highway users to the Fund, as estimated by the Department of Commerce, was about \$14,000,000, some \$9,000,000 less than Idaho received.<sup>15</sup> Thus, more than half the funds used to finance the building and maintenance of Idaho's highways came from the

<sup>13</sup> See United States Department of Commerce, Bureau of Public Roads, Circular Memorandum to Regional and Division Engineers, November 6, 1963.

<sup>14</sup> These figures are derived from Tables SF-1, SF-4, and SF-6 of *Highway Statistics*, an official annual publication of the Department of Commerce, Bureau of Public Roads, for the years in question. Since appellant did not contend in the courts below that the incidence of the tax was upon the federal government, we had no occasion to place these statistics in the record.

<sup>15</sup> These estimates are derived from Tables E-7 and E-8 of *Highway Statistics* (*supra*, fn. 14). The Federal Highway Trust Fund is financed by revenues generated by federal excise taxes on motor fuel; motor vehicles use; trucks, buses, and trailers; tires and tubes; and tread rubber.

federal Fund and approximately 21 percent (\$9,000,000 per year) was provided by highway users in other States. We note, moreover, that these figures do not take into account sums expended for highways in Idaho by other federal agencies, including the AEC itself. For example, the very highway upon which most of the gas here sought to be taxed was consumed—U.S. 20 between Idaho Falls and the National Reactor Testing Station—was constructed at a cost of approximately \$2,000,000, of which about \$1,100,000 (55 percent) was supplied by the AEC, about \$560,000 (28 percent) by the Federal Highway Trust Fund, and only about \$340,872 (17 percent) by the State of Idaho (which, however, maintains the road).

This massive federal contribution reflects the recognition of Congress that an adequate system of highways within and between the States is essential to the national interests and, particularly, the national defense. 23 U.S.C. 101(b). Fairness to Idaho and its highway users plainly does not demand that the taxpayers of the United States, who have already paid, and are increasingly paying, a major part of the bill for Idaho's roads, should have to pay again when the Atomic Energy Commission uses those roads for the very purposes which elicited the federal matching-fund grants. We do not say that this consideration is a self-sufficient basis for exempting the government from an otherwise valid State tax. But it lays to rest any contention that compelling equities require a relaxation of the long-established, and here plainly applicable, rule of governmental immunity.

## CONCLUSION

For the reasons stated, the judgment of the court below sustaining the tax should be reversed.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

LOUIS F. OBERDORFER,  
*Assistant Attorney General.*

FRANK GOODMAN,  
*Assistant to the Solicitor General.*

I. HENRY KUTZ,  
ROBERT A. BERNSTEIN,  
*Attorneys.*

CALVIN DWORSHAK,  
*Attorney for the American Oil Company.*

OCTOBER 1964.

## APPENDIX

The pertinent portions of the Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49-1201, *et seq.* (1963 Cum. Pocket Supp.) are as follows:

49-1201. *Definitions.*—The following words, terms and phrases in this chapter, are, for the purpose thereof, defined as follows:

\* \* \* \* \*

(c) The word "person" includes any individual, firm, co-partnership, association, corporation (both private and municipal), or other group or combination acting as a unit, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

(d) The term "dealer" shall include any person, as hereinabove defined, who first receives motor fuels in this state within the meaning of the word "received" as hereinafter in this section defined.

\* \* \* \* \*

(g) \* \* \* Motor fuel, for the purpose of determining liability for the payment of the tax imposed by section 49-1210, shall be considered to be "received" in the following cases:

1. Motor fuel refined at a refinery in this state and placed in tanks thereat or motor fuel transferred from points outside this state or from a refinery or pipe line terminal in this state and placed in tanks thereat shall be considered to be received when such fuel is withdrawn from such refinery or terminal storage for sale or use in this state or for transportation to destinations in this state other than for transfer to other refineries or pipe line termi-



nals in this state, and not before. When withdrawn from such refinery or terminal storage such motor fuel shall be considered to be received by the person \* \* \* for whose account such motor fuels were withdrawn *if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owns such fuel immediately prior to its withdrawal from said storage.*

2. Motor fuel imported into this state other than that placed in storage at refineries or pipeline terminals in this state shall be considered to be received immediately after the same is unloaded and by the person who is the owner thereof at such time\* *if such person is a licensed dealer; otherwise such motor fuel shall be considered to be received by the person who owned such fuel immediately prior to its being unloaded; provided, however, motor fuels shipped or brought into this state by a qualified dealer, which fuel is sold and delivered in this state directly to a person who is not the holder of an uncanceled dealer permit, shall be considered to have been received by the dealer shipping or bringing the same into this state; further provided that motor fuel which is in any manner supplied, sold or furnished to any person or agency, whatsoever, not the holder of an uncanceled Idaho dealer permit, by an Idaho licensed dealer, for importation into the state of Idaho from a point of origin outside the state, shall be considered to be received by the Idaho licensed dealer so supplying, selling, or furnishing such motor fuel, immediately after the imported motor fuel has been unloaded in the state of Idaho.* \* \* \*

49-1202. [1957 ed.] *Application for permit—Contents—Issuance of permit to dealers—Fee.—*It shall be unlawful for any dealer to import, receive, use, sell or distribute any motor fuels or

to engage in business, as a dealer in motor fuel, within this state unless such dealer is the holder of an uncanceled permit issued by the commissioner to engage in such business. \* \* \*

**49-1210. Report of motor fuel received—Excise tax.**—(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49-1201, during the preceding calendar month, and pay an excise tax of six cents per gallon on all motor fuels as provided \* in subsection (b) of this section. \* \* \*

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49-1201, by such dealer during the next preceding calendar month \*\* less the \* deductions and credits authorized in this chapter. \* \* \*

**49-1218. Refunding of tax.**—Any person who shall buy fifty gallons or more and use any motor fuel for the purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle required to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was pur-

chased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him \* \* \*

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**In the Supreme Court of the  
United States**

OCTOBER TERM, 1964

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF IDAHO

**BRIEF FOR THE APPELLEE**

**ALLAN G. SHEPARD,**  
Attorney General of the  
State of Idaho.

**WIL M. SMITH,**  
Assistant Attorney General of  
The State of Idaho.

**FABER F. TWAY,**  
Chief Legal Counsel,  
Idaho Department of Highways

**ANTON HOHLER,**  
Attorney,  
Idaho Department of Highways

# INDEX

Questions presented .....	I
Constitutional and statutory provisions involved .....	2
Statement .....	2
Argument .....	5
Summary of Argument .....	5
I. Whether or not the imposition of a tax violates the Due Process Clause or the Commerce Clause of the Federal Constitution should be determined from the performance of the contract viewed as a whole .....	8
A. Taken as a whole the contract calls for performance in Idaho .....	8
B. When a vendor holding a dealer's license enters into a contract, the major portion of which calls for performance inside the taxing state, two items arbitrarily selected for delivery by the dealer in another state cannot be said to be wholly dissociated from the vendor's local activities .....	13
II. Consistently with the Commerce Clause, a State may impose a fair and reasonable tax as compensation for using its highways .....	17
III. Even if the Idaho tax is viewed as a levy upon the purchaser's use of motor fuels within the state it is not invalid as a direct tax upon the United States .....	19

## II

A. The United States was not the ultimate consumer of the motor fuel in question, acting merely as a purchasing agent for the private corporations and individuals who used it .....	19
B. Even if the tax be viewed as a toll or assessment, it falls into a different category from a sales or use tax and does not belong to that class from which the United States is immune .....	20
Conclusion .....	24
Appendix .....	26

### CITATIONS

#### Cases:

<i>Aero Mayflower Transit v. Georgia Public Service Commission</i> , 295 U.S. 709 .....	17, 21
<i>Alabama v. King &amp; Boozer</i> , 314 U.S. 1, 9 .....	8, 20
<i>Alward v. Johnson</i> , 282 U.S. 509, 514, 51 S.Ct. 273, 75 L.ed 496, 75 A.L.R. 9 .....	8, 22
<i>City of Detroit v. Murray Corp.</i> , 355 U.S. 489 .....	7,
<i>Clark v. Poor</i> , 274 U.S. 554 .....	17, 21, 23
<i>Connecticut General Company v. Johnson</i> , 303 U.S. 77 .....	10
<i>Dixie Ohio Express Co. v. State Revenue Commission</i> , 306 U.S. 72 .....	7, 17, 21
<i>Felt &amp; Tarrant v. Gallagher</i> , 306 U.S. 62 .....	12
<i>General Motors Corporation v. Washington</i> , 377 U.S. 436 .....	6, 12, 15



### III

<i>General Trading Company v. Tax Commission,</i>	
322 U.S. 335 .....	12
<i>Graves v. Texas Oil Co.,</i> 298 U.S. 393 .....	8, 20
<i>Halliburton Oil Well Co. v. Reilly,</i> 373 U.S. 64 .....	7
<i>Hendrick v. Maryland,</i> 235 U.S. 610 .....	7, 17, 21
<i>Henneford v. Silas Mason Company,</i> 300 U.S. 577 .....	12, 15
<i>International Harvester Company v. Department</i>	
of Treasury, 322 U.S. 340, 358 .....	18
<i>Interstate Transit, Inc. v. Lindsey,</i> 283	
U.S. 183 .....	17, 21, 22
<i>Kane v. New Jersey,</i> 242 U.S. 160 .....	17, 21
<i>Kern-Limerick v. Scurlock,</i> 347 U.S. 110 .....	7, 19
<i>M'Culloch v. Maryland,</i> 4 Wheat. 316 .....	23
<i>McGoldrick v. Berwind-White Company,</i>	
309 U.S. 33 .....	15
<i>McGoldrick v. Felt &amp; Tarrant Company,</i>	
309 U.S. 70 .....	15
<i>McLeod v. Dilworth,</i> 322 U.S. 327 .....	11, 14
<i>Monomotor Oil Co. vs. Johnson,</i> 292 U.S. 86 .....	1, 18
<i>Norton v. Department of Revenue,</i> 340 U.S. 534 .....	14
<i>Panhandle Oil Co. v. State of Mississippi,</i>	
277 U.S. 218 .....	8, 20
<i>Scripto v. Carson,</i> 362 U.S. 207 .....	6, 12, 16
<i>Spector Motor Service v. O'Connor,</i> 340 U.S.	
602, 607 .....	17
<i>Sprout v. City of South Bend,</i> 277 U.S. 163 .....	21
<i>Tirrell v. Johnson,</i> 86 N.H. 530, 171 Atl. 641,	
aff'd 293 U.S. 533 .....	8, 21, 22
<i>Union Refrigerator Transit Company v. Kentucky,</i>	
199 U.S. 194 .....	10

#### IV

<i>United States v. Township of Muskegon,</i>	
355 U.S. 484 .....	8
<i>Western Union Telegraph Company v. Kansas,</i>	
216 U.S. 1 .....	18
<i>Wisconsin v. J. C. Penny,</i> 311 U.S. 435	6, 10, 11, 13, 16

#### Constitutions:

##### Constitution of the State of Idaho:

Article VII, Section 17 .....	2, 6, 18
-------------------------------	----------

#### Statutes:

##### State Statutes:

9 Idaho Code 49-1210 .....	2, 5
9 Idaho Code 49-1218 .....	18

In the Supreme Court of the  
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OCTOBER TERM, 1964

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THE AMERICAN OIL COMPANY, APP     ANT

v.

P. G. NEILL, ET AL

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ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF IDAHO

---

**BRIEF FOR THE APPELLEE**

---

**QUESTIONS PRESENTED**

I. Can Idaho's authority to impose a tax on motor fuels, to be paid by the dealer, be inhibited by a contractual act between dealer and consumer whereby the place of the passing of title from dealer to consumer is ostensibly changed from Idaho to Utah?

II. Whether the immunity of the federal government to state taxes applies where the ultimate consumer of the commodity taxed is not the government but private individuals or corporations even though the government is technically the buyer.

III. Does the immunity of the federal government to state taxes apply in a case where the proceeds of the tax are restricted by the state constitution to use for the construction and maintenance of certain public facilities and the tax is based and imposed proportionately according to the extent of the use of the facility by the taxpayer?

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The constitutional and additional statutory provisions which are relevant to the decision of this case, the pertinent text of which is set forth in Appendix hereto, are Article VII, Section 17 of the Idaho Constitution (1 Idaho Code 174) and parts of the Idaho Code, as amended, 9 Idaho Code 49-1210 and 49-1218.

#### **STATEMENT**

This is an action for the refund of certain taxes paid under protest to the Office of Tax Collector of the State of Idaho, by the Utah Oil Refining Company, predecessor to the American Oil Company, the appellant herein. The taxes, amounting to six cents per gallon were imposed on the dealer (Idaho Code, Section 49-1210 (a) (b) ). Proceeds of any tax imposed on gasoline and other motor fuels, in excess of the necessary costs of collection and administration and refunds are required by the Idaho Constitution to be used exclusively for highway purposes (Idaho Constitution, Article VII, Section 17).

The fuel upon which the tax was paid was purchased under General Services Administration Contract No. GS-10S-14022 (R. 2, 68, 69) to be ordered by the Atomic En-

ergy Commission (referred to herein as A.E.C.) for use in connection with its facilities located in, and in the area surrounding, Idaho Falls, Idaho (R. 95). While this gasoline was included as Items 63(a)(b) and 64(a)(b) in the bid invitation (R. 95), the award of September 15, 1959, did not include them (R. 73). They were, however, apparently added to the contract as a result of telephone conversations confirmed by telegrams (R. 69-70).

Motor Fuel Tax Reports submitted to appellee for the months of November and December, 1959, and January, 1960, show the purchaser of the gasoline under General Services Administration Contract No. GS-10S-14022 to be Phillips Petroleum Company and A.E.C. (R. 27-31) with the exception of one item, Item 20, (R. 31) which shows the purchaser as General Electric Company and A.E.C. The address on these reports is variously listed as Idaho Falls and Scoville, Idaho. Subsequent reports list the purchaser as the Atomic Energy Commission, address, Salt Lake City. Actually the gasoline was consumed at all times in the State of Idaho by the Phillips Petroleum Company in connection with its management contract with the A.E.C. (R. 202).

In order to determine the full import of this management contract, it will be necessary to go back and examine, insofar as the record shows, the way in which this motor fuel was handled and consumed. The contract provided, among other things, for the operation of buses used for the transportation of employees of the National Reactor Testing Station between the site and their homes (R. 202, 208). In transporting these employees, the buses and other motor

vehicles travel over Idaho streets and highways between the site and at least 16 cities, towns and villages in Idaho within a radius of approximately 65 miles of the National Reactor Testing Station. Employees pay a fee or toll for their transportation (R. 208, 252) which fee accrues to the use and benefit of the government. Losses involved in the operation are absorbed by the government (R. 208, 252).

The nominal purchaser of the motor fuel upon which taxes are in dispute is the A.E.C. but the actual user and consumer is the Phillips Petroleum Company. An employee of the Company during the relevant period has admitted under oath that he personally ordered gasoline from the suppliers, and that he selected the common carriers which transported the gasoline to Idaho Falls where it was removed from vehicles under the supervision of the employees of his Company. He further admitted that transportation charges were paid to the common carrier by the Phillips Petroleum Company (R. 215-216). Furthermore, representatives of the company have admitted that the purchasing arrangement between the A.E.C., Phillips Petroleum Company and the suppliers of the gasoline, one of which is the appellant or its predecessor, was a paper transaction developed for the express purpose of avoiding the Idaho Motor Fuels Tax (R. 203).

Of the 607 items listed in the invitation for bids, only 2, Items 63(a) and 64(a) were bid excluding state tax. The bid was submitted showing the state tax of \$ .06 included.

On September 15, 1959, appellant was awarded a contract on nine of the items included in the Invitation for Bids (R. 73). All of them called for delivery at Idaho lo-



cations except Item 486 which was to be delivered in Washington. None of them excluded state taxes.

## ARGUMENT

### SUMMARY OF ARGUMENT

The tax in question was imposed by statute (Idaho Code 49-1210) under a constitutional sanction requiring the proceeds of any tax on motor fuels to be used for highway purposes. Its constitutionality is questioned on two grounds: (1) that if its legal incidence is on the dealer it runs counter to both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment and (2) that it violates the government's constitutional immunity from state taxation if the incidence is on the consumer. We do not believe either of these conclusions is necessarily true.

We agree that this is a privilege tax, the incidence of which falls on the dealer, but have argued that its validity is unimpaired whether considered in this light or as a use tax.

Only in a very artificial or mechanical sense can the transaction be said to take place outside of Idaho. The contract, taken as a whole, called for performance at a number of locations inside Idaho. Performance was pursuant to order as provided in the bid. Each of the two items in question were bid in the alternative; one bid called for delivery in Salt Lake City, the other at the local installation of the activity. For the first three months of the contract term the fuel was delivered at a destination inside the State of Idaho, (R. 27-31) after that at Salt Lake City. The fuel was consumed in buses operated by the Phillips Petroleum Company under the terms of a contract with the Atomic

Energy Commission. These buses were used for the purpose of conveying private individuals, employees of private contractors, to and from work.

Even though the contract was between the General Services Administration and the appellant, the former could hardly be considered as anything but a purchasing agent, acquiring motor fuel for a number of government agencies and activities including the A.E.C. Fuel purchased from appellant was to be delivered and presumably consumed, with the exception of Item 486, in the State of Idaho. No question was raised as to the tax on any items except 63 and 64.

Performance of the contract was largely predicated upon facilities and activities in Idaho. Under these circumstances the appellant cannot claim tax immunity on a portion of the contract. A corporation cannot channel its operations through a maze of local connections and still maintain its tax immunity. *General Motors Corporation v. Washington*, 377 U.S. 436. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J. C. Penny*, 311 U.S. 435. The test is whether the taxing power exacted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *Wisconsin v. J. C. Penny*, supra. A formal contractual shift is without constitutional significance. *Scripto v. Carson*, 362 U.S. 207.

The revenue from the tax was channelled exclusively into a fund used for highway purposes. Article VII, Section 17, Idaho Constitution. Restrictions on the state's tax-

ing power under the Commerce Clause have been relaxed where it affirmatively appears that the tax was for this purpose. *Hendrick v. Maryland*, 235 U.S. 610. While a state may not tax the privilege of engaging in interstate commerce, it may impose a fair and reasonable tax on vehicles used in interstate commerce as compensation for using its highways. *Dixie Ohio Express Co. v. State Revenue Commission*, 306 U.S. 72.

The ultimate question is whether the tax, whatever its name may be, will in its practical operation, work discrimination against interstate commerce. *Halliburton Oil Well Co. v. Reilly*, 373 U.S. 64. There is no danger of any discrimination resulting from the imposition of this tax. On the contrary, it is patterned to eliminate that very feature. Anyone using Idaho's highways is required to contribute to the fund which pays for their construction and maintenance. Where the fuel upon which the tax is imposed is not so used a provision is made for refund. Where a tax on motor fuel is used exclusively for highway purposes, it is not discriminatory and is not an undue burden on interstate commerce. *Monamotor Oil Co. v. Johnson*, 292 U.S. 86.

Even if the tax is viewed as a levy upon the purchaser's use it is not a tax on the United States. It is ultimately used by private corporations and purchasers. The mere fact that an agent has effected the purchase will not be allowed to change the incidence of the tax. *Kern-Limerick v. Scurlock*, 347 U.S. 110. Nor will titular ownership by the government inhibit the imposition of tax upon private interests therein. *City of Detroit v. Murray Corp.*, 355 U.S. 489;

*United States v. Township of Muskegon*, 355 U.S. 484.

Neither is there any sanction against payment by the government of an excise tax on gasoline. These taxes were once invalid. *Panhandle Oil Co. v. State of Mississippi*, 277 U.S. 218; *Graves v. Texas Oil Co.*, 298 U.S. 393. The cases so holding, and presumably the legal principles involved, have been expressly overruled. *Alabama v. King & Boozer*, 314 U.S. 1.

Governmental immunity to state taxes does not extend where the tax is in the nature of an assessment for use of a public facility. *Tirrell v. Johnson*, 86 N.H. 530, 171 Atl. 641, aff'd 293 U.S. 533. There is a distinction between property which uses the public highways and that which does not. *Alward v. Johnson*, 282 U.S. 509.

# I.

WHETHER OR NOT THE IMPOSITION OF A TAX VIOLATES THE DUE PROCESS CLAUSE OR THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION SHOULD BE DETERMINED FROM THE PERFORMANCE OF THE CONTRACT VIEWED AS A WHOLE.

A. *Taken as a whole the contract calls for performance in Idaho.*

It seems to us a matter of some importance that neither of the parties involved in this transaction is simply an individual person. Both are sprawling and enormously complex entities—all pervasive organizations whose activities and interests are, from a geographical point of view, almost without limit. Because of the diverse and wide-spread nature of their operations almost any business activities between them could, by arrangement or otherwise, be across state

\*lines. Both have many legal domiciles (Appellant's Brief, p. 20). To designate any particular spot as the locus for the passing of title under these circumstances would be almost a thing of impulse.

While it is true that the invitations for bids were issued by the government in Seattle, Washington, the appellant submitted its bids from Salt Lake City, and the bids were accepted by the government in Seattle, this could hardly be said to be a factor in determining the locus of this particular transaction. These invitations covered 607 items in four states, only nine of which were originally awarded to the appellant. All except one of the items awarded to appellant called for delivery in Idaho. The two items in question, 63(a) and 64(a), were later awarded on the basis of telephone and telegraphic communications presumably as the result of some sort of negotiations. This part of the transaction did not specify the time of delivery nor the amounts to be included in each delivery. That was left up to the local governmental activity requiring the fuel. Nevertheless, and significantly, every single item in the bid schedule except the two in question called for delivery at the local installation of the particular governmental unit to which it was destined, and these two had alternate places of delivery, one of which was within the State of Idaho. Also, the bids submitted provided for the inclusion of a six-cent Idaho State Tax (R. 87). This was also true for the States of Oregon and Washington, the only other states in which appellant submitted a bid (R. 117, 137).

If we consider Items 4, 31, 43, 53, 76, 78, 81 and 82 as part and parcel of this transaction, and it is difficult to see

how such a result can be avoided, then it must certainly follow that most of the acts performed by the dealer in connection with the transaction took place inside the State of Idaho. Nor do the cases cited by the appellant bear out their contentions to the contrary. The case of *Connecticut General Company v. Johnson*, 303 U.S. 77, involved an insurance company authorized to do business in California. In Connecticut, where it was domiciled, it entered into contracts with other insurance companies, also licensed in California, to re-insure them against losses on policies of life insurance issued to California residents. The premiums were paid in Connecticut and the losses, if any, were also payable there. This Court declared invalid a tax imposed by California on the receipt of the re-insurance premiums paid to them. Here, quite clearly, the entire transaction took place outside of the taxing state. No portion of it really affected or was affected by events occurring there. Nothing was coming into or going out of California. "In the precise circumstances presented by the record it was found that the tax, neither in its measure nor in its incidence, was related to California transactions." *Wisconsin v. J. C. Penny*, 314 U.S. 435.

The analogy between *Union Refrigerator Transit Company v. Kentucky*, 199 U.S. 194, and the instant case is even more tenuous. There the State of Kentucky imposed a tax on tangible personal property permanently located in other states and used there in connection with the taxpayers business. Neither of these two cases is applicable to the situation presented in the case before us. Idaho is not attempting to impose a tax on the transaction remote to its



interests or on property located permanently outside its borders. All of the parties knew the property would be moved into the state and, in fact, the tax was not imposed until after it had been delivered to a point inside of the State of Idaho. "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which a tax is an exaction." *Wisconsin v. J. C. Penny*, supra.

It is said that "A tax upon the sale itself—the transfer of title or possession—would undeniably be invalid under *McLeod v. Diliworth*, 322 U.S. 327." In that case the corporation upon which the state imposed the tax was not only a foreign corporation, it was not even authorized to do business in Arkansas, the situs of the proposed tax. All of the business it did in Arkansas was through the medium of salesmen domiciled in Tennessee who came into Arkansas and took orders which were sent back to the home office and accepted there. The company was not set up to function in Arkansas and not even in the remotest sense had it subjected itself to the jurisdiction of the State of Arkansas or its taxing authorities. In the case we are now considering not only has the appellant gone into the State of Idaho to function as a business entity (R. 1) but has become licensed to engage in a particular kind of enterprise under a law which imposed certain conditions in the area of taxation (R. 2) by which it presumably agreed to abide.

Again, it is said that the State of Idaho seeks to avoid a constitutional barrier by resort to a bald fiction. In this transaction both buyer and seller were carrying on their respective endeavors inside the state imposing the tax. To

begin with, delivery was admittedly made to a point in the state. That was changed by agreement. The change required nothing more than a change of the point of destination on the bill of lading. To say, under these circumstances, that every act performed by the dealer in connection with the transaction took place outside of Idaho is, in itself, a patent fiction. On the other hand, there is no particular sanction, constitutional or otherwise, against imposing a tax on transactions which provide for the passing of title outside of the state. A number of cases have considered the problem and so held. See e.g., *General Trading Company v. Tax Commission*, 322 U.S. 335; *Henneford v. Silas Mason Company*, 300 U.S. 577; *General Motors Corporation v. Washington*, 377 U.S. 436; *Scripto v. Carson*, 362 U.S. 207; *Felt & Tarrant v. Gallagher*, 306 U.S. 62. This is particularly true when parties create artificial machinery or procedures to maintain the conditions required by law for tax exemption. *Scripto v. Carson*, supra, is a case in point. When the taxpayer argued that its "salesmen" were not its regular employees devoting full time to its service the Court said that "such a fine distinction is without constitutional significance," and added: "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a rampede of tax avoidance." A more formal "contractual shift" than was effected by the parties in this case would be both difficult to find and unlikely to occur. It was made midway in the performance of the contract as shown by the tax reports (R. 27-44) and admittedly for the sole purpose of avoiding payment of the state tax (R. 203).

The appellant here has quite obviously installed and maintained extensive industrial and commercial facilities inside of the state. Much of this very transaction, we have seen, calls for complete performance inside its borders. It enjoys the protection of the state's laws and the benefit of the business of its residents. The test of a tax of this nature was enunciated in *Wisconsin v. J. C. Penny Company*, supra:

"That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders."

B. *When a vendor holding a dealer's license enters into a contract, the major portion of which calls for performance inside the taxing state, two items arbitrarily selected for delivery by the dealer in another state cannot be said to be wholly dissociated from the vendor's local activities.*

Appellant is authorized to do business in the state of Idaho and has complied with all the laws pertaining to foreign corporations (R. 1). Furthermore, it is an Idaho licensed dealer in motor fuels under the Motor Fuels Tax law. It is obvious from the nature of the deliveries called

for in the contract that appellant maintains numerous facilities for the distribution of motor fuels in Idaho and that it has the necessary machinery in the state for the administration of business connected with these facilities. This becomes even more obvious when one considers that all except one of the items originally awarded to appellant under the contract call for delivery to Idaho destinations. We might say then that the commodity was to be consumed in Idaho and buyer and seller, although they might have been located elsewhere also, were likewise located inside of the state. Unquestionably, the contract as a whole, with the exception of the two controverted items, calls for performance in Idaho. To call the state's imposition of a tax a violation of due process under these facts seems to call for a strained construction of the term.

The transaction upon which the State of Idaho has imposed a tax in this case differs markedly from the situation in the several cases cited by appellant for the principle that this transaction was outside the state's taxing power. In the case of *McLeod v. Dilworth*, supra, all of the transactions on which Arkansas had imposed a tax were based entirely on acceptance of the offer in Tennessee. Every step in the performance of the contract took place in that state with the exception of the offer itself and that was communicated to the vendor there by its own agents. So far as appears in the statement of facts no situation arose where part of the contract was performed in Arkansas, part in Tennessee and there is no suggestion as to what the Court would have done under those circumstances.

In *Norton v. Department of Revenue*, 340 U.S. 534,

there is the same distinction. The Norton Company manufactured 225,000 items, of which only about 3000 were carried in the company's one Illinois branch. That part of the tax declared invalid by this Court was on items ordered directly by Illinois residents from the company's Massachusetts plant. These transactions never involved the local office and were therefore clearly and wholly dissociated from any local activity of the company. In the *Norton* case, the company was quite obviously carrying on much, if not most, of its Illinois business on a mail order basis. The appellant here was equally obviously carrying on most of its local business through its local units. Motor fuel is not normally brought into a state by the consumer.

While it is true the taxes were upheld in *Henneford v. Silas-Mason Company*, supra, *McGoldrick v. Berwind-White Company*, 309 U.S. 33, and *McGoldrick v. Felt & Tarrant Company*, 309 U.S. 70, on the ground that the direct burden of the levy was upon some incident, activity or use within the state, these holdings do not militate against the imposition of the tax in this case. Surely the changing of delivery, to a point outside the state, of some items called for in the performance of the contract should not enable parties to contend, as against the taxing power of the state, that this eliminates these items from the contract and dissociates that part of the contract from the vendor's local activities.

In the case of *General Motors Corporation v. Washington*, 377 U.S. 436, the protested tax was a gross receipts tax based on sales resulting from orders sent by General Motors dealers in Washington directly to the zone office at

Portland, Oregon, which orders were filled by direct shipments to the dealers from the factory. In affirming the validity of the tax the Court said: "Although mere entry into a state does not take from a corporation the right to continue to do interstate business with tax immunity, it does not follow that the corporation can channel its operations through such a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity."

In a sense the instant case presents the reverse of the situation in *Wisconsin v. J. C. Penny Company*, supra. There the tax was imposed on an out of state transaction, namely the paying of dividends, but the basis had left rather than crossed into, the state imposing the tax. If a tax on income earned in and taken out of a state is a proper basis for the taxing power even after it was taken into another jurisdiction then surely gasoline moving into a state to be used on its public highways should be at least as adequate. The principle of taxing merchandise coming into a state was clearly illustrated in *Scripto v. Carson*, 362 U.S. 207. Even though Scripto, Inc., a Georgia corporation, did all of its Florida business through 10 wholesalers, jobbers or "salesmen" and maintained no offices or permanent staff of any kind there, the tax was declared valid. The Court did not specifically label it a use tax but merely commented "It is not a sales tax but 'was developed as a device to complement [such a tax] in order to prevent evasion . . . by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum'." Rejecting the contention that there was a lack of sufficient



nexus to impose tax liability under these circumstances the Court said, "The test is simply the nature and extent of the activities of the appellant in Florida."

## II.

CONSISTENTLY WITH THE COMMERCE CLAUSE, A STATE MAY IMPOSE A FAIR AND REASONABLE TAX AS COMPENSATION FOR USING ITS HIGHWAYS.

While it is true that a state may not impose a tax on the privilege of engaging in interstate commerce, nevertheless, it may impose a fair and reasonable tax as compensation for using its highways for that purpose. *Dixie Ohio Company v. State Revenue Commission*, 306 U.S. 72, 76. The opinion in this case specifically referred to vehicles but the principle of making a distinction between taxes imposed for the benefit of highway construction and maintenance has been expressed many times. It was alluded to in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 607, cited by appellant. See also *Hendrick v. Maryland*, 235 U.S. 610, *Aero Mayflower Transit v. Georgia Public Service Commission*, 295 U.S. 709; *Clark v. Poor*, 274 U.S. 554; *Kane v. New Jersey*, 242 U.S. 160. If it appears affirmatively by the nature of the imposition, such as a mileage tax directly proportionate to the use, or by express allocation of the proceeds to highway purposes, that the tax is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic it is valid. *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183.

There can be little doubt that the proceeds from these taxes are going to highway purposes since they are so re-

stricted by the State Constitution, Article VII, Section 17 and provision is made by statute for refunds of all taxes on motor fuel not used on the state's highways, Idaho Code, Section 49-1218.

The tax must be fair and reasonable. A tax may not discriminate against interstate commerce in favor of local trade, nor impose cumulative burdens upon interstate trade or commerce. *International Harvester Company v. Department of Treasury*, 322 U.S. 340, 358. This tax does not contravene these principles. It treats everyone alike. There is no discrimination against either interstate or intrastate business. On the contrary this very section of Idaho's motor fuels tax law was developed to eliminate discrimination. The tax is always on the dealer licensed by the state to traffic in this commodity and is designed to prevent rather than to require or even permit a higher exaction from one type of operation than the other. *Western Union Telegraph Company v. Kansas*, 216 U.S. 1, cited by appellant, hardly presents the same situation. The tax there was on all of its authorized capital representing business and property both within and outside of the state and was imposed as a condition of its right to do business in Kansas. There is no such general tax problem involved in this case. It is designed to equalize among all who use Idaho's highways the burden of building and maintaining them. A tax on motor fuel, where it is to be used exclusively for highway purposes, is not discriminatory and is not an undue burden on interstate commerce. *Monomotor Oil Company v. Johnson*, 292 U.S. 86.

## III.

EVEN IF THE IDAHO TAX IS VIEWED AS A LEVY UPON THE PURCHASER'S USE OF MOTOR FUELS WITHIN THE STATE IT IS NOT INVALID AS A DIRECT TAX UPON THE UNITED STATES.

A. *The United States was not the ultimate consumer of the motor fuel in question, acting merely as a purchasing agent for the private corporations and individuals who used it.*

Even if the tax in question was to be viewed as a sale or use tax there is no violation of federal tax immunity by the State of Idaho in imposing the tax on the gasoline sold to the A.E.C. Appellant's position to the contrary, we believe, does not necessarily follow. The United States, although the nominal purchaser, was not the ultimate user or consumer of the object of the tax. This is illustrated perfectly in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, where the reverse of the situation is presented. There the State of Arkansas was attempting to collect, under its gross receipts tax law, a tax on two diesel tractors sold to a joint venture for government use. The contract provided that the contractor should be the purchasing agent and the government was to be directly liable to the vendors for the price. The tax was held to be invalid as a direct tax on the United States, the ultimate consumer. The obvious corollary to that situation is where the government buys a product for use by private consumers—exactly what we have here—and if the government is immune to a tax where private parties make a purchase for its benefit, the private parties should be liable where the government makes a purchase for their benefit.

But even if this were not the case and the United States was concededly the only and the ultimate user and consumer of the motor fuel in question it is still a valid tax. This Court had almost the identical question before it as long ago as 1928, *Panhandle Oil Company v. State of Mississippi*, 277 U.S. 218. In that case a contention that a dealer was not liable for a tax on that portion of gasoline sold to the United States for consumption by the Coast Guard and Veterans' Administration was upheld. Subsequently, in 1936, this Court decided *Graves v. Texas Company*, 298 U.S. 393. The statute constitutionally questioned in that case provided for an excise tax to be paid by the dealer "upon the selling, distributing, storing or withdrawing from storage in this state for any use, gasoline." It was clearly a sales tax and under the holding in *Panhandle* the dealer was held not to be liable for the tax on sales of gasoline to the United States. Both cases were specifically overruled in *Alabama v. King & Boozer*, 314 U.S. 1, 9. If the *Panhandle* and *Graves* cases were wrong under more modern concepts of governmental tax immunity there can be no doubt of the validity of the Idaho tax.

B. *Even if the tax be viewed as a toll or assessment, it falls into a different category from a sales or use tax and does not belong to that class from which the United States is immune.*

One thing is certain. This Court has always found taxes imposed for the purpose of constructing and maintaining public highways were perfectly valid as long as they bore a reasonable relation to the privilege of using the highways and this was always true even though interstate commerce

was involved. *Hendrick v. Maryland*, supra, (1915); *Kane v. New Jersey*, supra, (1916); *Clark v. Poor*, supra, (1927); *Sprout v. City of South Bend*, 277 U.S. 163, (1928); *Interstate Transit, Incorporated v. Lindsey*, 283 U.S. 183, (1931); *Aero Mayflower Transit Company v. Georgia Tax Commission*, supra, (1935); *Dixie Ohio Express Company v. Commission*, supra, (1938). The reason is obvious particularly where the tax is on gasoline and other motor fuels. It represents one of the few areas where the tax imposed presents a perfect relationship to the benefits enjoyed. A tax on a package of cigarettes or a suit of clothes, for example, would bring no tangible benefits. One could presumably derive the same enjoyment without the tax, and taxed or not, the object could be enjoyed to the same extent within or without jurisdiction imposing the tax. Where highways are built and maintained with taxes on gasoline and other motor fuels as they are in Idaho and many other states, the taxes on each gallon of fuel are clearly related to the enjoyment of highways as well as the fuel, and the amount of enjoyment is frequently proportionate to the amount of tax. Furthermore, the tax is levied only where the enjoyment is in the jurisdiction in which it is imposed.

Appellant insists that our reliance on the case of *Tirrell v. Johnson*, 86 N.H. 530, 171 Atl 641, aff'd 293 U.S. 533, is misplaced. It is said that the case was decided on two grounds, one, that governmental immunity did not attach in the case of a tax of this kind because it was in the nature of a toll and two, that the purchaser was not the federal government but a private contractor. The case was

affirmed in a memorandum decision, and, appellant says, affirmed solely on the second ground. If indeed it is possible to render any sort of interpretation from a memorandum decision, we seriously question whether or not that is the correct one. The very first case cited in the per curiam opinion, *Alward v. Johnson*, 282 U.S. 509, 514, 51 S.Ct. 273, 75 L. ed 496, 75 A.L.R. 9, was almost identical factually with *Tirrell v. Johnson*, supra, except that the tax was based upon gross income rather than on gasoline. The taxpayer operated automotive stage lines by virtue of a contract with the Post Office Department. The theory that this was a toll rather than a tax was not advanced but neither was the theory of governmental immunity. Nevertheless, the Court did say that "The distinction between property employed in conducting a business which required constant and unusual use of the highways and property not so employed is plain enough."

The distinction has been frequently used. In *Interstate Transit, Inc. v. Lindsey*, supra, this Court had under consideration a tax imposed on motor buses, graduated according to the carrying capacity. For example, it imposed a tax of \$500 per year for each vehicle seating more than 20 and less than 30 passengers. In an opinion reversing the decision of the Supreme Court of Tennessee holding the tax invalid, Mr. Justice Brandeis stated: "While a state may not lay a tax on the privilege of engaging in interstate commerce (citations) it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintain-



ing them and of regulating the traffic thereon." Cited in the *Lindsey* case was *Clark v. Poor*, supra, wherein a similar tax was upheld on the same reasoning. The same Justice there stated: "The highways are public property. Users of them although engaged exclusively in interstate commerce are subject to regulation by the state to be sure of safety and convenience and the conservation of the highway. (citations) Users of them although engaged exclusively in interstate commerce may be required to contribute to their costs and upkeep. Common carriers for hire who make the highways their place of business may properly be charged an extra tax for such use."

While it is true that these cases involve interstate commerce and not tax immunity by the United States, nevertheless it is quite apparent that this Court has always noted a difference in this type of tax which is exacted specifically for the purpose of constructing and maintaining highways and moreover it is imposed on a basis that has an extremely close relevance to the amount of use enjoyed by the taxpayer. One way or another, the amount of the fuel consumed, and therefore the amount of tax paid, is related in almost perfect proportions to the amount of use derived from the highway. It follows, of course, that the cost of constructing and maintaining highways, to the state, is similarly related to the amount of use these highways receive from the motorists who use them.

The whole doctrine of federal immunity to state taxes began with Chief Justice John Marshall's famous pronouncement "The power to tax is the power to destroy" in the case of *M'Culloch v. Maryland*, 4 Wheat. 316. At that

time and in that case the doctrine had some validity. The tax was a direct property tax upon an instrumentality of the government located inside the state. Federal operations could certainly be discouraged if not actually inhibited by the sort of tax which could be manipulated at the will of local politicians. These same considerations are not relevant where the ultimate question is whether or not the United States government should pay the same price as any private individual for motor fuels which it intends to consume in vehicles utilizing the highways constructed and maintained by the State of Idaho. This is particularly true when these vehicles are used to transport the employees of private contractors to and from work. That these same highways should have been partly constructed by funds provided by another branch of the federal government is not the question. Idaho has imposed this tax and used this method of imposing it in order that there be no discrimination among the motorists using its public highways. It only asks, in the same spirit, that there be no discrimination against it by these same motorists including the federal government.

#### CONCLUSION

For the reasons stated the judgment of the court below sustaining the tax should be affirmed.

ALLAN G. SHEPARD  
*Attorney General of the  
State of Idaho*

WM. M. SMITH  
*Assistant Attorney General  
of the State of Idaho*

FABER, F. TWAY  
*Chief Legal Counsel,  
Idaho Department of Highways*

ANTON HOHLER  
*Attorney, Idaho  
Department of Highways*

## APPENDIX

The pertinent portion of the Idaho Constitution (I Idaho Code 174) is as follows:

## Article VII,

\* \* \*

§ 17. *Gasoline taxes and motor vehicle registration fees to be expended on highways.*—On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

The pertinent portions of the Idaho Code, as amended, 9 Idaho Code 49-1210 and 49-1218 are as follows:

49-1210. REPORT OF MOTOR FUEL RECEIVED—EXCISE TAX.—(a) In addition to the taxes now provided by law, each and every dealer, as defined in this chapter, shall, not later than the twenty-fifth day of each calendar month render a statement to the commissioner of all motor fuels received, as the term "received" is defined in section 49-1201, during the preceding calendar month, and pay an ex-

cise tax of six cents per gallon on all motor fuels as provided \* *in subsection (b) of this section*. Such statements shall include the following: (1) An itemized statement of the number of invoiced gallons of motor fuels received, within the meaning of the term "received" as defined in section 49-1201, by such dealer within this state during the next preceding calendar month. Such statement shall show the date, place, and quantity of each receipt of motor fuels, the point of origin, the method by which received, the name of the person from whom motor fuels were received, and such other details of each transaction or operation by which motor fuels were received as the commissioner may consider necessary for the proper administration of this chapter. (2) An itemized statement showing the number of gallons of motor fuels received and thereafter disposed of by \**deductible* transactions authorized in this chapter, together with such supporting details of each such transaction as the commissioner may consider necessary for the proper administration of this chapter.

(b) At the time of filing each monthly report each dealer shall pay to the commissioner an excise tax of six cents per gallon on all motor fuels "received," within the meaning of the term "received" as defined in section 49-1201, by such dealer during the next preceding calendar month, \*\* *less the \* deductions and credits authorized in this chapter*. Such tax shall be computed as follows: (1) From the total number of gallons of motor fuels received by the dealer within the state during the next preceding calendar month upon which the tax has not been paid or accrued, shall be made the following deductions: (A) the number of gal-

lons of motor fuel disposed of by \* *deductible* transactions authorized in section 49-1215 and (B) the number of gallons of motor fuels subject to tax under section 49-1227 and (C) the number of gallons \* \* \* *upon which tax has been paid for which credit may be taken under subsection (c) of this section and (D) the number of gallons which shall be equal to two per cent of the total number of gallons received during the preceding calendar month less the total number of gallons deducted under subparagraphs (A) and \* (C) of this paragraph, which credit is granted dealers and retail dealers to cover evaporation, shrinkage, and losses, and to reimburse the dealer for his expenses incurred on behalf of the state in maintaining records, collecting tax moneys, preparing necessary reports and remittance in compliance with this chapter. Provided, however, that one-half of said two per cent deduction \* \* shall be passed on to the retail dealers, and shall be deducted from the invoice on all sales of motor fuels made by dealers to retail dealers by the dealer deducting from the invoice price one per cent of the total motor fuels tax on each gallon sold to the retail dealer at the time of purchase. (2) The number of gallons remaining after the deductions and credits hereinabove set forth have been made shall be multiplied by six cents and the resulting sum shall be the amount of motor fuel tax to be paid for the next preceding month. The report and remittance shall be considered to have been filed within the required time if the envelope in which they are contained is postmarked on or before midnight of the twenty-fifth day of the calendar month in which due and payable.*

(c) Whenever it shall appear from the monthly report



filed by any dealer that such dealer has, during the period covered by such report, exported, sold or used \* \* \* during such period an amount of motor fuel as set forth in subparagraphs (A) \* , (B) and (C) of subsection (b) (1) of this section in excess of the amount of motor fuels received by such dealer within the state of Idaho during said period, such dealer shall be entitled thereupon to a refund of the excess tax payment.

(d) All monies received from one cent of the six cents per gallon tax herein provided for shall be placed in the state highway fund to be used only for the purpose of matching federal funds for the construction, maintenance, improvement and reconstruction, of highways and farm to market roads in the state of Idaho, as provided for in federal acts.

(e) *In lieu of the collection and refund of the tax on motor fuels used by a dealer in such a manner as would entitle a purchaser to claim refund under section 49-1218, or in lieu of the refunding of any prior erroneous payment of tax made to the state by a dealer, credit may be given the dealer upon his tax return and the determination of the amount of his tax.*

(f) *Credit may be given any dealer, upon his tax return and the determination of the amount of his tax, for tax remitted by him to the state on gasoline which is subsequently returned to such dealer's pipe line, terminal or refinery and placed in tanks thereat.*

49-1218. REFUNDING OF TAX.—Any person who shall buy fifty gallons or more and use any motor fuel for the

purpose of operating or propelling stationary gasoline engines, tractors or motor boats engaged in commercial uses other than fishing, or for cleaning or dyeing or other use of the same, except as otherwise provided by law, and except in any motor vehicle required to be registered by the provisions of the uniform motor vehicle registration act, or exempt from registration by reason of ownership or residence and except an aircraft, and who shall have paid any excise tax on such motor fuel hereby required to be paid, whether directly to the vendor from whom it was purchased, or indirectly by adding the amount of such excise tax to the price of such motor fuel, shall be entitled to be reimbursed and repaid the amount of such excise tax so paid by him in the following manner and under the following conditions:

(a). Claimant shall present to the commissioner a statement supported by the original receipted seller's invoices showing purchase. Such statement shall be certified by the claimant to be true and correct and shall state the name of the person from whom purchased, the date of purchase, the total amount of such motor fuel purchased, that the motor fuel so purchased has been paid for, and that the same has been used by said claimant otherwise than in motor vehicles operated or intended to be operated upon the public highways within the state of Idaho.

Upon approval by the commissioner and the state board of examiners of such statement and supporting invoices, the state auditor shall draw his warrant upon the state treasurer for the amount of such claim in favor of such claimant and such claim shall be paid from the "motor fuel re-

fund fund": Provided, that the application for reimbursements and repayments as provided herein shall be filed with the commissioner within three hundred and sixty (360) days from the date of purchase, or not at all.

(b). The commissioner shall have the right, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose, and the failure of the claimant to accede to the demand for such examination shall constitute a waiver of all rights to the refund claimed on account of the transaction questioned.

(c). When the motor fuel is sold to a person who shall claim to be entitled to a refund of the tax hereunder imposed, the seller of such motor fuel shall make out a separate invoice for each purchase showing the name and address of the seller and the name and address of the purchaser, the number of gallons of motor fuel so sold, and the date. Such invoice shall be of serial number type especially used for the sale of petroleum products and shall be issued in at least duplicate copies, the original of which shall be given to the purchaser at the time of sale, and the duplicate copy shall be retained by the seller for a period of one year from date of sale, subject to the inspection of the commissioner; all invoices shall be written in ink or with indelible lead pencil and shall be void if any corrections or erasures appear upon the face thereof.

The above conditions having been fully complied with, the commissioner shall determine the amount of refund due to such applicant, and the same shall be paid as herein provided; provided, that the commissioner shall have power

to put into effect such regulations as in his judgment may be necessary to detect the uses and purposes to which gasoline or other motor fuel upon which refund of taxes applied for is put.

The commissioner may in his discretion require each applicant for a refund under this act to make out his claim upon blanks to be prepared and furnished by the commissioner, which blanks shall have plainly printed thereon the provisions relating to the penalties for making false claim for refund.

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1964**

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**No. 19**

**THE AMERICAN OIL COMPANY, APPELLANT**

**v.**

**P. G. NEILL, ET AL.**

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**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF  
IDAHO**

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**REPLY BRIEF FOR THE APPELLANT AND THE UNITED STATES  
AS AMICUS CURIAE**

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The purpose of this reply brief is to correct an important inaccuracy in the Brief for the Appellees and to answer two contentions not dealt with in our principal brief.

1. Appellees state (Br. 5) that for the first three months of the contract term the fuel was delivered at a destination inside the State of Idaho, and only after that at Salt Lake City. Later (Br. 11-12), they assert that "[t]o begin with, delivery was admittedly made to a point in [Idaho]". That was

changed by agreement. The change required nothing more than a change of the point of destination."

These assertions are inaccurate and highly misleading. The contract between the General Services Administration and the appellant called for the delivery of the fuel f.o.b. Salt Lake City (R. 95). An affidavit by an officer of the Utah Oil Company (appellant's predecessor) shows (R. 62-63), and the Supreme Court of Idaho found (R. 252-253, 255), that throughout the entire term of the contract—not merely during the last nine months—the fuel was delivered at Salt Lake City to carriers selected and paid by the AEC. At no time did the appellant designate the carrier or pay the transportation charges. At all times, title to the fuel, and with it the risk of loss or damage in transit, passed to the government at Salt Lake City, and appellant's contractual responsibility was as fully discharged as if the fuel had been picked up in Salt Lake City by the government's own tank trucks.

Appellees' erroneous statement that the gasoline was delivered at points in Idaho during the first three months of the contract was based solely upon a series of monthly reports submitted by the appellant to the State Tax Collector. For the three months in question, the reports listed various Idaho locations as the "Address" of the purchaser (R. 28-29, 31). Thereafter, the "Address" was uniformly given as Salt Lake City (R. 32-44). Apparently, the person who made out the report form at first construed it as asking for the place where the fuel was ultimately consumed, but later concluded that it was the point of delivery which



was called for. Significantly, the very same reports which list Idaho locations under the "Address" column state explicitly that the fuel was "sold and delivered to the Atomic Energy Commission, an agency of the United States, f.o.b. Salt Lake City. . . ." (R. 27, 30).

Plainly, the appellant's confusion in replying to an ambiguous question in a report form cannot alter either the terms of the contract or the facts of delivery, as established by uncontroverted affidavits and as found by both courts below.

2. Appellees' argument in this Court (Br. 8-13) is predicated upon a ground which they did not advance in the State court proceedings and which is not even mentioned in the decision of the Idaho Supreme Court. Briefly, the theory is that eleven items, including the two in issue here, were awarded to the appellant under the same bid invitation and therefore should be considered as a single contract; that most of the acts of appellant with respect to items other than the two in issue were performed inside Idaho; and that the transactions here were thus not "dissociated" from appellant's activities within the State of Idaho. That theory, we submit, is manifestly unsound.

There is no basis for the proposition that the eleven items awarded to the appellant were all part of a single contract. "Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole so that there would have been no bargain whatever, if any promise or set of promises were struck out.'" (*United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298). Here, the

acceptance of appellant's offer with respect to the two items in issue (63a and 64a) was in no way related to the bids or awards on other items. The invitation included 607 separate items, each designed to supply a discrete need of a particular government agency at one of a multitude of locations in a four-State area. Bids on each item were evaluated on their individual merits and accepted or rejected without reference to the other items,<sup>1</sup> so that awards could theoretically have been made to 607 different suppliers. The separateness and independence of items 63 and 64 are further indicated by the fact that appellant's bids on these items were not accepted at the same time as the others, but only two days later. These items were the only ones in which the AEC was the ordering agency; and the quantity of gasoline involved here (1,200,000 gallons) was of a completely different order of magnitude from that involved in any of the other transactions (the largest of which was only 3,000 gallons). Indeed, the AEC's requirements were more than 60 times greater than the volume called for by appellant's other nine contracts put together.<sup>2</sup> The mere fact that appellant had earlier been awarded other contracts to deliver small amounts of gasoline to other government agen-

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<sup>1</sup> See, for example, "Terms and Conditions of the Invitation for Bids" (R. 166): "The Government may accept any item or group of items of any bid \* \* \*."

<sup>2</sup> Items 4, 31, 43, 53, 76, and 81 each involved 2,000 gallons. Item 78 involved 2,500 gallons; item 82, 3,000 gallons; and item 486 (delivery in Washington), 900 gallons (R. 88, 91-93, 97-98, 149). The total volumes supplied under all of these items was 18,400 gallons, as compared to the 1,200,000 involved in the instant transaction.

cies at other sites in Idaho was, so far as this transaction is concerned, an entirely unrelated circumstance.

It would make no difference, moreover, even if all eleven items were deemed for some purpose to constitute a single contract. The basic objection to the tax—that it falls on activities which took place outside the State—would not be cured simply because the same contract happened to require performance of other activities which could properly be subjected to a State tax. The fact would remain that the activities which Idaho here seeks to tax were wholly “dissociated,” both factually and legally, from the in-State activities which resulted in the sale and delivery of the other gasoline to other agencies elsewhere in Idaho.

3. Appellees argue (at p. 19) that while the United States was the nominal purchaser of the gasoline, Phillips Petroleum Company was the actual purchaser and ultimate user or consumer. That contention becomes relevant, of course, only if the incidence of the tax is upon the in-State user of the gasoline, rather than upon the dealer. In our main brief, however (pp. 27-29), we demonstrated that this is not the case. We there pointed out that, in the proceedings below, the parties agreed, the trial court explicitly held, and the Idaho Supreme Court strongly implied that the tax is precisely what it appears to be—a privilege tax upon the dealer. And despite implications to the contrary in their Motion to Dismiss, appellees now expressly agree with us that “this is a privilege tax, the incidence of which falls on the dealer” (Br. 5).

Accordingly, as the trial court concluded (R. 223), the status of Phillips Petroleum is "not \* \* \* material to a decision of this case, because if it is not a 'use tax,' it becomes unimportant who was the actual purchaser."

Let us suppose, however, contrary to fact, that (a) the Idaho tax were a "use" tax and (b) that Phillips, by virtue of its management contract, were liable for that tax. It still would not follow that Idaho could validly appoint as its tax collector an out-of-State dealer which (i) was not itself subject to the tax; (ii) had no contractual relationship with Phillips and no means of obtaining reimbursement from it; and (iii) could "collect" the tax, if at all, only from the United States, which enjoys a constitutional immunity from the tax.

In an effort to overcome that obstacle, appellees argue that Phillips was not only the ultimate consumer of the fuel, but also the true purchaser, and the AEC merely acted as its "purchasing agent" in dealing with the appellant. That contention has no support in the record and, indeed, turns the relationship between the government and Phillips upside down. A responsible official of the AEC stated in his affidavit (R. 208), without contradiction, that the gasoline imported from Utah was placed in storage tanks owned by the United States; that the fuel was later consumed in government-owned vehicles used to transport government personnel to and from the AEC installation; that the fee charged for this transportation accrued to the sole benefit of the government and

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was deposited in a government-owned bank account; and that the losses regularly incurred in this operation were borne by the government. Thus, while Phillips, pursuant to its management contract, was in charge of the operation of the vehicles, and in that sense may perhaps be looked upon as a "user" of the gasoline, the government most certainly did not purchase the fuel on Phillips' behalf. To be sure, the affidavit of appellees' attorney (R. 215-216) states that employees of Phillips testified in deposition in another case that it was they who actually ordered the fuel, selected the carriers, and paid the transportation charges. On the other hand, the affidavit of an AEC official (R. 59) states that these functions were performed by the AEC. Moreover, the contract for the sale of the fuel explicitly designates the AEC as the "ordering activity" (R. 95) and states (R. 58) that the ordering activity will "place its own orders, make payment thereon, issue tax exemption certificates when appropriate, and furnish Government bills of lading for shipments which are to be made at Government expense." In the face of this contractual provision, it is difficult to see how employees of Phillips could possibly have placed the orders or paid the freight charges, unless it be assumed that Phillips was acting on the government's behalf and as its agent. But be that as it may, there is not the slightest indication in the record that Phillips paid the purchase price of the fuel or agreed to reimburse the government for such payment; and that alone seems fatal to any contention that Phillips was the "purchaser" or in any way a party to the transaction with appellant.



Furthermore, whether or not the government be considered a "purchasing agent" for Phillips, it seems clear under the principle of *McCulloch v. Maryland*, 4 Wheat. 316, that Idaho could not validly send its tax bill to the United States and expect the government to look to Phillips for reimbursement. *A fortiori* it cannot achieve this purpose indirectly by requiring an out-of-State dealer to "collect" the tax from the United States. This conclusion is in no way inconsistent with the decisions holding that a State (a) may impose a tax upon private parties doing business with the government even though the economic burden of the tax ultimately falls on the government (e.g., *Alabama v. King & Boozer*, 314 U.S. 1) or (b) may require an out-of-State vendor to collect for it a use tax imposed on the in-State consumer (e.g., *Scripto v. Carson*,<sup>3</sup> 362 U.S. 207). In the first

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<sup>3</sup> The appellees erroneously imply that the tax upheld in *Scripto* was not a use tax and that its legal incidence was on the out-of-State vendor rather than the in-State user. Thus, appellees state (Br. 16) that the Court in *Scripto* "did not specifically label [the tax] a use tax." This is quite incorrect. At 362 U.S. 208 this Court explicitly noted that "[b]oth the trial court and the Supreme Court of Florida held that appellant does have sufficient jurisdictional contacts in Florida and, therefore, must register as a dealer under the statute and collect and remit to the State the *use tax* imposed on its aforesaid sales" (emphasis added). Later the Court declared that "we [do not] believe that Florida's requirement that appellant be its *tax collector* on such orders from its residents changes the situation. \* \* \* Moreover, we note that Florida reimburses appellant for its service in this regard" (*id.* at 212; emphasis added). Plainly, therefore, *Scripto* does not stand for the proposition that a State may impose a tax on an out-of-State transaction merely because the seller does other business within the taxing State;



class of cases, the private contractor must pay the tax because its legal incidence is upon him; here, in contrast, the incidence of the Idaho tax (viewed as a use tax) is plainly not on the appellant, whose role, if any, is solely that of a collector. The second line of cases is equally inapposite, for in none of them was the out-of-State vendor required to collect the use tax from a party, such as the United States, which is itself constitutionally exempt both from the tax and from any collection requirement.

Respectfully submitted,

ARCHIBALD COX,  
*Solicitor General.*

LOUIS F. OBERDORFER,  
*Assistant Attorney General.*

FRANK GOODMAN,  
*Assistant to the Solicitor General.*

I. HENRY KUTZ,  
ROBERT A. BERNSTEIN,  
*Attorneys.*

*Of counsel:*

CALVIN DWORSHAK,  
*Attorney for the American Oil Company,*  
*P. O. Box 737,*  
*Simplot Building,*  
*Boise, Idaho.*

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but only for the long-settled proposition that a State may impose a use tax on the consumption of property within the taxing State and may require the out-of-State vendor to collect that tax.